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Issue Date: 11 June 2003

CASE NO.: 2003-STA-12

IN THE MATTER OF:

THOMAS P. MCDEDE

Complainant

v.

OLD DOMINION FREIGHT LINE, INC.[1]

Respondent

APPEARANCES:

RAUL LOYA, ESQ.

For The Complainant

SIDNEY MURPHY, ESQ.

For The Respondent

Before: LEE J. ROMERO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Surface Transportation Assistance Act of 1982, 49 U.S.C. § 31105 (herein the STAA or Act), and the regulations promulgated thereunder at 29 C.F.R. Part 1978. The STAA prohibits covered employers from discharging or otherwise discriminating against employees who have engaged in certain protected activities with regard to their terms and conditions of employment.

On or about September 18, 2002, Thomas P. McDede (herein Complainant or McDede) filed a complaint against Old Dominion Freight Line, Inc. (herein Respondent) with the Occupational Safety

[1] The caption appears as amended at the hearing.

and Health Administration (OSHA), U.S. Department of Labor (DOL), complaining of various unsafe acts under the STAA, including his termination on March 18, 2002. (ALJX-1; Tr. 243). An investigation was conducted by OSHA and on November 27, 2002, the Regional Administrator for OSHA issued the Secretary of Labor's Findings concluding that Complainant's complaint was untimely and lacked merit. (ALJX-1).[2] Complainant subsequently filed a request for formal hearing with the Chief Administrative Law Judge, Office of the Administrative Law Judges. (ALJX-2).

Thereafter, a Notice of Hearing and Pre-Hearing Order issued, scheduling a hearing in Dallas, Texas on March 11, 2003. (ALJX-3). On January 21, 2003, in compliance with the Pre-Hearing Order, Complainant filed a formal complaint alleging the nature of each and every violation claimed as well as the relief sought in this proceeding. (ALJX-4). On January 29, 2003, Respondent duly filed its Answer to the Complaint. (ALJX-5).

The parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Complainant proffered CX-1 through 3, 32 through 36, 40 through 42, 77 through 119, 124 through 125, 128, 132, 134 through 138, 145 through 175, 178 through 185, and 256 and 257 which were received into evidence. CX-4 through 17, and 139 through 144 were withdrawn. CX-18 through 31, 37 through 39, 43 through 76, 120-123, 126, 127, 129 through 131, 133, 176 and 177 were not received. CX-256 was reserved pending the deposition of John Matias. ALJX-1 through 5 were received. Respondent proffered RX-1 through 5 which were received. RX-6 was reserved for the deposition of John Matias.

The record was left open until March 28, 2003, for Respondent to depose John Matias and possibly gather further evidence from OSHA contingent upon Mr. Matias's deposition testimony.

On March 26, 2003, Respondent submitted the post-hearing deposition transcript, videotape, and exhibits 1 through 6 of John

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[2] References to the record are as follows: Transcript: Tr.____; Complainant's Exhibits: CX-____; Respondent's Exhibits: RX-____; and Administrative Law Judge Exhibits: ALJX-____.

Matias, which were received into evidence as RX-6.[3] The hearing in this matter was formally closed on April 4, 2003.

Complainant and Respondent filed post-hearing briefs by the due date of April 25, 2003. Based upon the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Recommended Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (ALJX-1, pp. 5-6), and I find:

1. Respondent is engaged in interstate operations and maintains a place of business in Dallas, Texas. (Tr. 7).

2. During the regular course of its business, Respondent's employees operate commercial motor vehicles, principally to transport common freight. (Tr. 7-8).

3. Respondent is now and, at all times material herein, has been an employer as defined under Section 31101(3) of the Act. (Tr. 8).

4. Respondent hired Complainant as a driver of a commercial motor vehicle having a gross vehicle weight rating in excess of 10,001 pounds. Id.

5. At all material times herein, Complainant was an employee driving a commercial motor vehicle used on highways to common freight, and in the course of his employment, directly affected commercial motor vehicle safety under Section 31105 of the Act. (Tr. 9).

6. Complainant was terminated on March 18, 2002. (Tr. 243).

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[3] CX-256, Complainant's July 11, 2002 letter addressed to Mr. Matias is exhibit 2 to RX-6. Accordingly, CX-256 is hereby received into evidence.

II. ISSUES

The issues for resolution based upon the pleadings are:

1. Whether Complainant's complaint was timely filed?

2. Whether Complainant engaged in protected activity within the meaning of the STAA?

3. Whether Respondent terminated Complainant in retaliation for his protected activities in violation of the STAA?

III. CONTENTIONS OF THE PARTIES

Initially, Complainant argues he timely filed on July 11, 2002, a complaint with John Matias, who represented himself as an OSHA employee and who would forward the complaint to the area director of OSHA. Alternatively, he argues his complaint should be considered timely through the application of the doctrine of equitable tolling. He argues he timely filed a claim in Texas state court alleging "violations of transportation rules and regulations, only days after his termination." He contends Respondent "is in continuing violation of the Federal Motor Carrier Safety Regulations [FMCSR] and continues to discriminate against protected activity." Because his termination has allegedly "sent a clear message to anyone who cannot comply [with Respondent's trip assignments] . . . or files a complaint reporting violations," he argues equitable considerations warrant acceptance of his claim under the continuing violation doctrine.

Complainant contends he was terminated for engaging in protected activities, namely filing an internal complaint and for refusing to drive. Specifically, on March 13, 2002, Complainant contends he wrote a handwritten letter to Respondent's manager, Jim Amos, complaining about Respondent's policy of enforcing its "trip sheets," which are documents provided to drivers identifying minimum and maximum times to travel between origination and destination points. In his letter, he stated he was "refusing to continue to break the law by changing his logs" and asserted Respondent's trips violated regulations and were illegal.

Complainant argues the trip sheets, which allegedly provide "mandatory" driving times between different cities, allow insufficient time to reach destinations such as Birmingham, Alabama and Stanton, Texas from Dallas, Texas. He claims the trip sheets require drivers to exceed maximum driving times established in

Sections 392.3, 395.3(a)(1) and (2), 392.3, 395.13(b) through (d) of the FMCSR, 49 C.F.R. § 392 et seq., thereby making driving runs dangerous and unsafe.

Additionally, he alleges Respondent required him to "work his logs," or falsely report his hours, if he exceeded the federally regulated maximum driving times. He identifies one instance in which Respondent allegedly demanded that he amend his driving logs when he logged 70.5 hours in eight days.

He argues he "refused to operate Respondent's commercial motor vehicle when he had reasonable apprehension of serious injury to himself or the public due to his fatigued condition." Thus, Complainant argues he was not terminated for delaying freight, which he alleges is a "pretextual and illusory" motive. Rather, he concludes Respondent has "no excuse" for his termination, which was in retaliation for engaging in protected activity under the Act.

Furthermore, Complainant contends he was "set-up" by Respondent, who manufactured delays for him by compelling his attendance at a safety meeting with Ron Weigle to watch a videotape, and take an examination on March 14, 2002, before he departed for San Antonio, Texas. Respondent allegedly sabotaged his driving schedule again by requiring him to remain on-duty in San Antonio, which caused him to reach a maximum of fifteen on-duty hours in Temple, Texas. After he informed Respondent he was out of hours, he claims he was directed to drive to Waco, Texas, where he was told to find a hotel room, which took more than three hours. After resting for eight hours, Complainant argues he stopped for a meal and proceeded to Dallas, where he was unable to submit his driving logs because Respondent's terminal was locked.

Complainant did not believe reinstatement was an option at the hearing; however, in his post-hearing brief, he seeks reinstatement, back pay, expungement of all references pertaining to his protected activity and termination from his record, and any relief at law or in equity which the undersigned finds just.

On the other hand, Respondent argues dismissal of this matter is appropriate because Complainant did not timely file his complaint pursuant to 49 U.S.C. § 31105(b)(1), and there is no basis for the application of equitable tolling. Respondent contends Complainant's testimony is not credible or persuasive because of factual inconsistencies in his own testimony, inconsistencies with other testimony adduced at the hearing, inconsistencies in his driving log for the period of March 14

through 16, 2002, and his admissions that he completed, signed and submitted fraudulent driving logs.

Respondent asserts it did not violate the Act when it terminated Complainant on March 18, 2002. Respondent maintains Complainant "created a confrontational situation" with Mr. Amos and Mr. Rhodes on March 12, 2002 or March 13, 2002, when he was out of control, demanding a sleeper cab. When he protested he would take the sleeper cab without authorization, Respondent's managers threatened to call 911.

Respondent concedes its manager Mr. Morrison received a hand-written note complaining of allegedly illegal driving runs and argues Complainant declined to attend a meeting on March 13, 2002, when he was going to be given an opportunity to explain why he thought its runs were illegal. On March 14, 2002, Complainant attended a meeting which was again scheduled to provide an opportunity to explain why Complainant thought Respondent's runs were illegal, "but gave no rational basis for such assertion," arguing only that he wanted a sleeper cab. Respondent argues Complainant was "counseled, but was not terminated." Respondent explained its discussion with Complainant was documented in an interview report, which Complainant refused to sign.

Thereafter, Respondent contends Complainant conducted himself unreasonably by fabricating driving logs, allegedly failing to timely contact Respondent about meeting or exceeding his maximum driving time, failing to submit his driving logs upon completion of his trip, failing to submit his freight bills, failing to reasonably explain to Respondent the circumstances of his extended trip from Dallas, Texas to San Antonio and return, and for delaying freight. Allowing time for traffic conditions, brief breaks and an eight-hour rest along the trip, Respondent argues there is no reasonable explanation for a 22.5-hour trip from San Antonio to Dallas when Complainant completed his trip from Dallas to San Antonio in five hours.

Further, Respondent argues Complainant could have avoided delaying freight by simply proceeding to its Waco terminal, with which he was familiar. There, his cargo could have been transferred and he would have been provided a hotel room. Accordingly, Respondent contends Mr. Morrison, Mr. Vincent, and Mr. Stoddard appropriately elected to terminate Complainant for delay of freight.

Respondent argues Complainant's driving runs are consistent with the FMCSR. It argues Complainant violated the 70-hour rule

once, for which Complainant suffered no reprimand, discharge, or other form of discriminatory conduct. Respondent alleges Complainant misunderstands its trip sheets, which exclude time for pre-driving inspections, hook-ups and other preparations, but include stopping for a break or meal. The maximum time indicated in its time sheets allegedly represents time beyond which there "might be a problem and cause to look for the driver." Respondent argues none of the trips identified in its time sheets require drivers to violate the FMCSR.

Consequently, Respondent argues Complainant failed to establish he was discharged, disciplined, or discriminated against because he engaged in a protected activity. Rather, he was terminated because he acted unreasonably and delayed freight.

IV. SUMMARY OF THE EVIDENCE

The Testimony

Complainant

Complainant has been a truck driver for 8 years. From February 26, 2001 until March 15, 2002, he worked for Respondent.[4] He "never had an incident over there . . . was never late, and never missed a day . . . I was always looking forward to my future and working real hard to keep my job." (Tr. 161-163).

During the first week he was employed with Respondent, Complainant noticed Respondent maintained long runs from Dallas to destinations such as Albuquerque, New Mexico and Birmingham, Alabama. Although the runs were long, dispatchers such as Ray Rhodes and Jim Amos would "make us feel unprofessional by saying something like, "You can do it. You just got to work your logs," which implied to Complainant that he should "cheat on my logs." For instance, a thirteen to fifteen-hour run from Dallas to San Antonio was to be completed in ten hours.[5] (Tr. 164-167).

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[4] Prior to working with Respondent, Complainant was an over-the-road driver for "Schneider" for "about a year." He performed the same occupation for "American Driver" for "about four and a half years." He briefly worked for "Roahl Transport" while he worked for American Driver. (Tr. 229-231).

[5] Complainant stated that, "if you've got a truck that runs 65 miles per hour and all you're looking at is driving time on the highway," it is not possible to complete a 630-mile trip from

Complainant attempted to "work my logs like they were telling me to," and on one occasion "made a mistake with the math and it came up over the seventy hours during the week." He acknowledged Respondent's "Daily Record for Usable and Excess Hours for Drivers" report, which indicates Complainant logged 70.50 hours in the eight-day period prior to September 27, 2001. He was advised by Mr. Amos, Mr. Rhodes, and Mr. Morrison that he could choose to be written up or "just re-do your logs." He was provided a "brand new blank log book" to "re-do my logs so they looked legal." For instance, a trip from Dallas to Birmingham, which would "take way over ten hours to run," was falsely logged as a 13.5-hour trip, including three hours off-duty, half an hour of on-duty (not driving), and ten hours of driving. The driving logs of record are Complainant's falsely amended logs, and the original, correct logs were seized and destroyed by Respondent. (Tr. 167-173; CX-81-82; CX-91).

Complainant testified he continued to follow Respondent's policy of falsely logging time because he had to support his family. At some point during the "[2001] Christmas season," he was extremely fatigued while returning with hazardous cargo from Albuquerque to Dallas. He had recently made many trips to destinations including El Paso, Albuquerque, and Birmingham. He was suddenly frightened with the feeling that his life and the lives of other people on the road were in danger due to his fatigue and the nature of the cargo he was hauling. (Tr. 173-175).

Complainant considered searching for a new job, but was concerned that other drivers for Respondent may become involved in a deadly accident for which Complainant would feel responsible. Consequently, "right around Christmas," he "verbally approached" Tony Morrison and stated he could not complete his driving trips within Respondent's prescribed 10-hour time limits. Mr. Morrison instructed Complainant to continue falsely logging his time. (Tr. 176-179).

Likewise, Complainant complained of the time conflict between actual and reported hours of driving time to "Mr. Vincent," the "lead man in the Dallas terminal." Mr. Vincent replied that there was "not really much I can do about [it];" however, he informed Complainant a sleeper cab might be available if it was not already

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Birmingham, Alabama to Dallas, Texas in ten hours. If a truck could maintain a speed of 69 miles per hour, Complainant stated it would be "questionable" whether the driver could complete the 630-mile trip in ten driving hours. (Tr. 283-284).

in use by another driver. This discussion occurred "towards the end of January [2002]." Prior to that time, Complainant, who was "out of town a lot," was having difficulties communicating with Mr. Morrison about the "delicate situation," so he "came up with that sleeper theory." (Tr. 179-180).

On March 12, 2002, Complainant arrived at work with a letter for Mr. Amos in which he identified his ongoing concerns of time conflicts and safety violations. Mr. Amos and Mr. Rhodes were the dispatchers on duty. Both men became angry with Complainant. Mr. Amos started cursing at Complainant while Mr. Rhodes said, "Well, you're not even going to be doing any runs tonight. I'm not going to put you on the board tonight because of this." Complainant asked to sleep at a hotel or use a sleeper unit to "be able to take his eight hour break." Both requests were allegedly refused, and Mr. Amos said, "You're not even going to take that sleeper. If you get in that sleeper and you're half-way down the road, I'm calling the cops on you." Mr. Rhodes refused to let Complainant drive until Complainant spoke with Mr. Morrison. Mr. Amos refused any further discussion with Complainant, who was unable to deliver his letter. (Tr. 176-177, 181-183; CX-124; RX-1, p. 79).

At 5:00 a.m. on March 13, 2002, Complainant arrived at Respondent's facility to meet Mr. Morrison, who arrived at 5:20 a.m. Thereupon, Complainant presented his letter to Mr. Morrison, who received it.[6] Complainant reported his desire to comply with the FMCSR to Mr. Morrison, who informed Complainant he would call Complainant back after he spoke with John Vincent. Mr. Morrison sent Complainant home. "Between six and seven" that night, Mr. Rhodes called and directed Complainant to attend "a meeting the next morning at ten a.m. with [Mr.] Morrison and [Mr.] Vincent." (Tr. 183-184; RX-1, p. 80).

At 8:00 a.m. on March 14, 2002, Mr. Rhodes telephoned to inform Complainant their meeting was postponed until "somewhere around two" because "we're busy now." Complainant arrived at 2:00 p.m., and "went into their office and they were still busy in some other meeting." He waited until 2:30 p.m., when Mr. Morrison directed Complainant to accompany him to a meeting with Mr. Vincent. (Tr. 184-185).

At the meeting, Complainant "stuck to [his] guns" regarding his complaints over Federal Safety Issues. He "asked them if they

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[6] Complainant testified he submitted no other written complaints to Respondent before March 13, 2002. (Tr. 301).

would want to possibly make up a motel room, because, you know, to make these . . . runs legal, or if you're going on a longer trip like that, possibly have a sleeper unit available." Complainant was "basically saying [he] wanted to run legal." Mr. Morrison and Mr. Vincent responded with an interview report "saying the same thing back to me." Complainant described the letter as "a very odd message," because "I gave them a letter saying I wanted to do the runs legal, and then they turned around and . . . gave me a write-up and said that they're going to want . . . me to do the runs legal." He refused to sign the interview report because "I didn't do anything wrong. All I did was write a letter." Before he left the meeting to return home, Complainant informed those present that he would "write my logs legal [sic] from now on, the way they're supposed to be." (Tr. 185-186, 555-557; CX-125).

At 6:00 p.m. on March 14, 2002, Mr. Rhodes contacted Complainant at home and directed him to come to work at 8:00 p.m. He arrived at 7:45 p.m. because he "always showed up about 15 minutes early" to "get our trucks set up and stuff like that." At 8:00 p.m., Complainant was instructed to attend a "safety meeting," which he thought was "odd" because "there was no notice or anything for a safety meeting." He was led to an office, where he watched "a video" and took a test. "Ron Weigle" was present during the meeting that lasted "about 40 [or] 45 minutes." Complainant logged this time as "on duty-not driving." (Tr. 187-188).

After the safety meeting, Complainant was informed his truck was "not quite loaded," but that he should "get ready to go." Complainant completed a pre-trip inspection on his truck and discovered a malfunctioning left rear tail-light which warranted servicing at Respondent's maintenance shop. He estimated "70 to 85 percent of my trailers that I would pull would be out of inspection." He finally departed Dallas for San Antonio at 10:00 p.m. on March 14, 2002. The trip to San Antonio took five hours to complete. (Tr. 198-199).

Upon arrival in San Antonio around 3:00 a.m., Complainant was told by the dispatcher that there were no loaded trailers available with which to return to Dallas, and that he should "get two empties" to load. This was an "unusual request" that "never happened before." Subsequently, Complainant requested his "dispatch sheet or what you get upon arrival," but was told by the dispatcher that it was not ready. (Tr. 188-191; 557-558).

Complainant spent two hours at the San Antonio facility attending to unloaded trailers. He logged this time as "on duty-not driving." His co-worker, Mr. Weigle, did not experience the

same delays. Complainant departed San Antonio around 5:00 a.m. on Friday, March 15, 2002, and "hit early morning traffic" in Austin, Texas on his way back to Dallas. In Temple, Texas, he reviewed his logs and realized he was "going to be over in hours and couldn't make it back up to the terminal." He called Mr. Morrison, who replied, "Go to Waco. See if you can find a motel room." Complainant was told to call Mr. Morrison upon arrival in Waco. Complainant considered driving to Respondent's terminal in Waco, Texas, where Respondent has a "designated motel room."[7] (Tr. 200-203).

When he reached Waco, Complainant attempted to reach Mr. Morrison, who was in a meeting. He contacted "Charlie," a dispatcher at the "main office" in North Carolina. Charlie directed Complainant to "just do what [Mr. Morrison] told you to and go find a motel room." Because he was towing "a double," which was difficult to park, Complainant could not easily find a hotel. He eventually found lodging at the "Delta Inn" at 12:30 p.m., but was forced to wait until a 2:00 p.m. check-in time to enter his room. After eight hours of rest, Complainant checked out of the hotel at 11:00 p.m, readied his truck and left for Dallas. He stopped to eat "because I was pretty worn out." He arrived at the Dallas facility at 2:30 a.m. on March 16, 2002, parked his trailers and went home.[8] (Tr. 204-206).

On Monday, March 18, 2002, Mr. Morrison called Complainant at home and told Complainant he was being terminated for delaying freight. Complainant was "surprised . . . because he authorized

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[7] Complainant denied initially calling Mr. Morrison from Waco. Mr. Morrison did not tell Complainant to "go to the depot," nor did he say "go to a designated motel. He said go find your own motel room." (Tr. 559).

[8] Complainant's driving log for the March 14, 15, and 16, 2002 round-trip from Dallas to San Antonio was not submitted to Respondent after his completion of the trip. Complainant admitted there is a box for the submission of driving logs in Respondent's break-room at the Dallas facility, but testified he was unable to deliver his log upon arrival because Respondent's facility was locked. Complainant admitted he made no further effort to submit his driving log to Respondent. Although Mr. Morrison allegedly requested that Complainant's wife deliver copies of his Waco hotel receipts, Complainant did not provide his driving log to his wife to be included with his hotel receipts. (Tr. 286, 308-309).

the motel room to me." Mr. Morrison "mentioned something about Ron Weigle [made] it back and I didn't." Complainant was unaware how many hours Mr. Weigle worked the week before March 18, 2002, nor did he have "any idea" whether Mr. Weigle "had enough hours to continue working or whether he had to stop." Complainant received no written termination letter. (Tr. 206-208, 559-561).

On July 11, 2002, Complainant and his counsel delivered a formal complaint to "John Matias" at Mr. Matias's office, which had a sign on the door that represented the office was an office of the Occupational Safety and Health Administration.[9] Prior to July 11, 2002, Complainant's counsel informed Complainant that they would be visiting Mr. Matias. After he reviewed Complainant's complaint, photographs, driving logs, and other materials, Mr. Matias informed Complainant and his counsel that he would forward the complaint to Katherine Delaney, OSHA's regional supervisor. Complainant was unaware if Mr. Matias ever forwarded the letter to Ms. Delaney, but "supposed" his attorney followed-up with Mr. Matias concerning the status of the complaint. (Tr. 207-211; CX-256).

According to Complainant, Respondent's minimum driving times prescribed for various destinations exceed ten hours. Further, the driving times were derived from driving to each destination in an automobile without the necessity of pre-trip and post-trip inspections required for tractor-trailers. The driving times were also derived based on unrealistic assumptions that a driver would experience no delays and that a driver could drive through cities rather than around them. Drivers often experience traffic stops, traffic lights, and mandatory detours around some cities that do not allow tractor-trailers to pass directly through a metropolitan area. (Tr. 221-222; CX-102; CX-105; CX-172; CX-173).

For instance, one of Respondent's trip sheets prescribed a driving time of 13 hours and 25 minutes for a trip from Dallas to Birmingham, Alabama; however, Complainant regularly took 15 hours to complete the trip, which "was somewhere around 665 [to] 670

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[9] Complainant never photographed the office sign of John Matias. He believed John Matias was an employee of OSHA because "[Mr. Matias] was conducting a training for OSHA." Mr. Matias "said he worked for OSHA," and was training other OSHA representatives when Complainant met him on July 11, 2002. (Tr. 247-250).

miles," because "trucks have to go around cities" along the way.[10] To complete the run from Dallas to Birmingham, Complainant was not allowed to stop after ten hours of driving. (Tr. 221-222; CX-106).

Despite Complainant's protests that such runs exceeded ten hours of actual driving time, Mr. Vincent, Mr. Morrison, Mr. Rhodes, and Mr. Amos instructed Complainant to complete trips within Respondent's prescribed times. Complainant complained of the driving times at various opportunities and at his meeting in which he received the interview report. (Tr. 222-224).

After his termination with Respondent, Complainant had to "start out at the bottom again" with Arnold Transportation (Arnold).[11] There, Complainant had no seniority, which precluded him from receiving more profitable trips that were provided to drivers with higher seniority. His current annual salary is less than $20,000.00, which is much less than Respondent paid him.[12] Arnold provides benefits which are similar to those Respondent provided to Complainant. (Tr. 224-226; CX-257; CX-258; RX-1, pp. 83-85).

Complainant believes he was "set-up." Respondent manufactured a delay for Complainant by causing him to be late upon his departure from Dallas to San Antonio. Upon arrival in San Antonio, Respondent caused Complainant to be late by forcing him to move trailers, which resulted in his arrival at Austin during rush-hour on his return to Dallas. Further, by involving another driver, Mr. Weigle, "[Respondent] had a witness." Complainant explained:

> That's what they were thinking. If we can get him stuck in traffic, we can get him to go over hours, then when he

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[10] Complainant noted Jackson, Mississippi precluded trucks from passing directly through town. He also noted Shreveport, Louisiana imposed a 45 miles-per-hour speed limit. (Tr. 284-285).

[11] At the hearing, the parties referred to "Arno," which ostensibly means Arnold Transportation Services, Inc., an employer which inquired of Complainant's background with Respondent pursuant to a March 20, 2002 pre-employment questionnaire. (RX-1, pp. 83-85).

[12] Complainant's 2002 and 2001 Wage and Tax Statements indicate he earned $11,793.11 and $38,578.46, respectively, from Respondent. (CX-257; CX-258).

> gets in, we'll just have our write-up here, and we got our witness here, we can let him go, because he's trying to let the monkey out of the barrel, our cover up, our secret. The big [Respondent] secret.

(Tr. 560-561).

On cross-examination, Complainant admitted his employment application includes no information regarding his employment with Roahl Transportation. Pre-termination wage and salary information from 2001 and 2002 was not provided until the hearing. No post-termination wage information was submitted because he was never asked for post-termination wage information. He admitted post-termination employment with Arnold was available "right away." (Tr. 231-235).

Complainant admitted he was terminated on Monday, March 18, 2002, despite his September 18, 2002 complaint filed with OSHA which indicates he was terminated on March 25, 2002.[13] Complainant recalled an OSHA investigator provided the March 25, 2002 date, which is within 180 days of September 18, 2002. Complainant "just agreed" with the investigator, who, like Mr. Matias, did not take an affidavit from Complainant. This interview occurred after the filing of his September 18, 2002 formal complaint. Complainant admitted the September 18, 2002 filing makes no reference to another complaint filed on July 11, 2002, with Mr. Matias. (Tr. 237-243, 250-252; ALJX-1, pp. 8-9).

Complainant possessed a copy of the FMCSR and understood the differences between on-duty time, off-duty time, and driving time. He agreed that the only time he logged two hours as on-duty in San Antonio was on March 15, 2002, when he was assigned the unusual task of working with empty trailers. On previous occasions when he

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[13] On Friday, March 22, 2002, Complainant filed a petition with a state court in Dallas County requesting depositions of Mr. Morrison and "Mr. John Vince," a mistaken reference to Mr. Vincent. Complainant was introduced to Mr. Vincent "three or four months" after he started employment with Respondent. Sometime after Christmas 2001 or in January 2002, Complainant requested a sleeper truck from Mr. Vincent. Complainant's last encounter with Mr. Vincent occurred on March 15, 2002, when his conversations with Mr. Vincent and Mr. Morrison culminated in the interview report. Other than those three incidents, Complainant did not speak with Mr. Vincent "other than hi and bye." (Tr. 239-240; RX-2).

performed the Dallas-San Antonio trip, Complainant was always told to "wait out in my truck . . . [until] the trailers were ready." Usually Complainant would "sit out in my truck and sleep, but there's no sleeper, so actually that's on-duty time." Complainant was told to rest in his truck rather than in the break-room at Respondent's San Antonio facility. (Tr. 253-259).

According to Complainant, sleeping behind the wheel is on-duty time. Nothing prevented Complainant from sleeping on the passenger side of his truck's cab where he sometimes slept. That time is considered on-duty time as well. Complainant added that he logged his time differently on March 15, 2002 because "that was the day that I said I would do my logs the right way." (Tr. 259-260).

For the eight-day period ending September 27, 2001, Respondent's records indicate Complainant logged 70.50 hours as on-duty or on-duty and driving. Respondent did not tell Complainant to amend his driving logs until "about a month and a half or two months later," when Respondent's auditor reviewed the data and noticed Complainant exceeded 70 hours. He previously submitted the original copy of his September 2001 log book, but was asked for his personal copy because Respondent did not have a copy of the original, which was "already in North Carolina." Respondent allowed Complainant five days to complete and return his amended driving logs. (Tr. 261-266, 270; RX-5, p. 283).

Complainant agreed that Respondent's records indicate he worked more than 70 hours during the week of September 27, 2001, which is inconsistent with the notion that he amended his logs to conform with a 70-hour rule; however, he noted that Respondent's records reflect the data in his driving logs before he was asked to change them. Complainant stated his own records, which only include copies of his amended logs, reveal shorter driving times.[14] (Tr. 270-272). With the exception of the driving log regarding the

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[14] Driving logs submitted by Complainant indicate he drove fewer hours and reveal different points of origination and destination. For instance, Complainant's copy of his driving log for September 20 to 21, 2001 indicates he was off duty for twenty-one hours and driving three hours on a trip from "Larado, Texas" to Dallas, Texas; however, Respondent's copy of his driving log for the same dates indicates Complainant was off-duty for twenty hours, driving for three and a half hours, and on-duty (not driving) for one-half hour on a trip from "San Antonio, Texas" to Dallas, Texas. (CX-90; RX-5, p. 320; See also Tr. 264-268; CX-91 through CX-97; EX-5, pp. 321-332).

eight-day period ending on September 27, 2001, all of Complainant's driving logs submitted to Respondent comply with the 70-hour rule. (Tr. 285-286).

Although he acknowledged requesting a sleeper truck at times before his termination, Complainant denied that "the real issue in this case is that [he] wanted a sleeper truck." He understood Respondent would provide a hotel accommodation for him if he was out of hours only after reaching his destination. He admitted he called Respondent only once with a request to stay in a hotel because he was out of hours. His request was granted, and he was informed he would be reimbursed for his expenses. (Tr. 272-275).

Despite his failure to sign Respondent's March 14, 2002 interview report, Complainant admitted he knew he might face disciplinary action up to and including discharge for refusing a dispatch when he had available hours. He also understood that he was expected to run all runs in the same amount of time as other drivers with the same equipment, which is why he refused to sign Respondent's interview report. (Tr. 280-282).

Complainant explained his logs regarding March 14 and 15, 2002 were irregular out of "habit" after "all this time of making me cheat on my logs . . . ." Although his logs might have reasonably indicated he could not timely complete his trip before he even departed Dallas for San Antonio after the meetings he attended on March 14, 2001, he was not worried about how much time his round-trip would take "until after I got caught in traffic [in Austin, Texas] and then I realized, whoa, I just signed a thing saying that I would keep my records straight . . . ."[15] (Tr. 303-305).

The first time he pulled over was in Temple, Texas, where he called Mr. Morrison at 9:00 a.m. on March 15, 2002, to request a hotel. Mr. Morrison instructed Complainant to get some sleep. (Tr. 287-288). Although he knew he was out of hours, he continued driving to Waco because "my orders were to obey Respondent's time line." He further explained that he told Mr. Morrison he could not find a place to park his trailers in Temple. (Tr. 311-312).

Complainant arrived in Waco at 11:00 a.m., and called Charlie in North Carolina shortly thereafter. He called Charlie again at 12:30 p.m. to receive a purchase order for the motel room. At that time, Complainant also called the Dallas terminal and spoke with a

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[15] Complainant admitted he was referring to the interview report which he did not sign. (Tr. 306).

dispatcher, whose name was "Pope," after he was informed Mr. Morrison was in a meeting. By 1:00 p.m., Complainant provided the necessary purchase order information to the motel, but was informed he could not check-in until 2:00 p.m., after the room was cleaned. Complainant waited in his truck until around 2:00, when a motel representative "came out and got me." He "finally got in there [his hotel room], dropped my case, and I looked at the time and it was three o'clock." He explained that the motel representative had to "check out" his purchase order to "make sure it was all right to use . . . ." (Tr. 288-292; CX-113; CX-114).

Complainant admitted his room was paid for by Respondent, but he had no receipt. He gave the receipt to Mr. Morrison, who never asked Complainant for it, post-termination. Counsel for Respondent asked Complainant how he gave the receipt to Mr. Morrison, in light of his alleged testimony elsewhere that he did not see Mr. Morrison again after March 18, 2002. Complainant responded he "sent it in to him" via his wife, who was not identified as a witness in this matter. He did not know the date that his wife allegedly submitted the receipt to Mr. Morrison, but was sure she did on a day when he was busy trying to find a job. (Tr. 292-293; 308).

Complainant conceded he had no written documentation regarding the alleged safety meeting on March 14, 2002.[16] Other than his driving log which he failed to submit to Respondent upon his arrival in Dallas, Complainant conceded he has no documentation of any alleged cover-up by Respondent. (Tr. 561-562).

Complainant admitted his return-trip from San Antonio to Dallas took 21 and one-half hours to complete. Eight of those hours were spent sleeping, while six hours and 45 minutes were used to drive, resulting in a total of 14 hours and 45 minutes that was not spent at Respondent's facilities. Although he knew there was a terminal in Waco where drivers were available to complete the trip to Dallas, Complainant made no effort to call the Waco terminal. (Tr. 310-311).

Complainant admitted signing a document on February 14, 2001, which described Respondent's complaint procedure. Complainant admitted Respondent maintained an "open door" policy that provided for complaints, which may be sensitive, to be raised with different

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[16] Complainant acknowledged his February 25, 2003 affidavit which described a safety meeting and included supporting documentation. He admitted the supporting documentation was dated March 11, 2001, "over a year earlier," and was time-stamped March 15, 2001. (Tr. 297-299).

managers as provided in its "Open Door Policy" posters. Respondent's employees may contact their immediate supervisors or contact higher management "all the way up to Mr. Joel McCarty or Ms. Sandy Marshall."[17] Complainant testified that he was on his way to Mr. McCarty or Ms. Marshall when he was terminated. After he was terminated, he did not attempt to contact Mr. McCarty or Ms. Marshall. Likewise, he did not attempt to reach Mr. Brian Stoddard, who is Respondent's director of safety and personnel, after his termination. He admitted that, other than the instant matter, he did not experience other forms of alleged harassment or discrimination while employed with Respondent. (Tr. 301-303).

John Matias

On March 24, 2003, the parties deposed Mr. Matias, whose live testimony was recorded on videotape. He has been an employee of Engineering Safety Consultants (ESC) for "a little over three and a half years." (RX-6, p. 6).

Mr. Matias has never been an OSHA employee, nor has he ever represented himself as an OSHA employee. (RX-6, pp. 6-7). Mr. Matias's company shirt, which is "basic attire" that he has worn to work "every day" since he began working for ESC, clearly displays an "ESC" logo, which includes no reference to OSHA.[18] He would have worn the shirt in July 2002. ESC publications and advertisements do not indicate he is an OSHA officer or employee. (RX-6, pp. 7-8). ESC's office has never had anything on the doors, walls, or windows to indicate that it is an OSHA office.[19] (RX-6, pp. 12, 19). Mr. Matias's business cards include a company logo, which is

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[17] Complainant did not know who Joel McCarty was, although Sandy Marshall "sounds familiar. I'm not sure." (Tr. 300). Mr. McCarty is identified as Respondent's General Counsel in High Point, North Carolina. He is available to receive complaints of discrimination or harassment as is Ms. Sandy Marshall. (RX-1, p. 39).

[18] A review of the videotape copy of the deposition confirms Mr. Matias's testimony regarding the appearance of the logo.

[19] Mr. Matias acknowledged a photograph that fairly and accurately represented the front of his office building, which has not changed since July 2002. In the photograph, the words "Engineering Safety Consultants" are clearly written on the wall. (RX-6, p. 12; RX-6, exhibit no. 1).

the same logo as that displayed on his company shirt, name of the company, and his name; however, his title as regional manager is no longer included. (EX-6, pp. 19-20; RX-6, exhibit no. 6).

In the "summertime" of 2002, Mr. Matias briefly spoke with Complainant's counsel, who "had some questions about some sort of paperwork, and I wasn't understanding exactly what that was." Consequently, he arranged a meeting to obtain more details. In July 2002, Mr. Matias met with Complainant and his counsel. After he introduced himself and his company and its facility to Complainant and his counsel, he brought them to a conference room for further conversation. Complainant and his counsel "were trying basically to turn in some sort of paperwork to an OSHA representative, to the area director." (RX-6, pp. 8-10; RX-6, exhibit no. 2).

When Mr. Matias recognized his name was on Complainant's paperwork, he realized "they had us confused with OSHA." Consequently, he invited another ESC consultant, James Calderon into the room. Together, the consultants explained "we weren't OSHA and again explained what we do, we're a private organization, and we gave them some information about OSHA. And I pulled from my cell phone at the time the OSHA's office number for Kathryn Delaney," which he provided, along with directions to Ms. Delaney's office, to Complainant and his counsel. (RX-6, pp. 10-12). After he realized the letter was addressed to OSHA, Mr. Matias did not read the substance of the letter. He does not know what the instant matter concerns. (RX-6, p. 17).

Mr. Matias had no further contact with Complainant or his counsel until March 12, 2003, when they visited him at his office to determine whether their paperwork was forwarded to OSHA. He informed them he did not recall any exchange of paperwork, which he confirmed with his other consultant. He was not asked by Complainant or his attorney to testify in the instant matter. (RX-6, pp. 15-16).

Mr. Matias testified he never assured Complainant or his counsel their letter would be forwarded to OSHA, nor did he accept delivery of their letter. At the deposition, Mr. Matias was presented with a copy of Complainant's formal complaint, which included a time stamp indicating the complaint was received by OSHA on September 18, 2002. Mr. Matias noted that no such stamp was printed on Complainant's July 11, 2002 complaint addressed to Mr. Matias. Neither he nor his office has such a time stamp. (RX-6, pp. 17-18; RX-6, exhibits no. 2 and 3).

At the deposition, Mr. Matias was presented a copy of Complainant's affidavit. He agreed he met with Complainant and his counsel. He denied he is an OSHA officer or represented himself as such. He denied knowledge of anything that indicates he was an OSHA officer in July 2002. He denied receiving any paperwork or offering any assurances the letter would be forwarded to the OSHA area director. Had he made such an assurance, he testified he would recall it. (RX-6, pp. 19-22; RX-6, exhibit no. 4).

At the deposition, Mr. Matias was presented a copy of Complainant's Response to Motion for Summary Judgment, and again denied he is an employee or representative or officer of OSHA. He denied making any representations to Complainant or his counsel that paperwork would be forwarded to the OSHA area director. He denied accepting any complaint or letter from either Complainant or his attorney. He made it clear he was not an OSHA officer authorized to accept delivery of a complaint which must be filed with that agency. He believed he did not do anything that could be reasonably construed as representing that he had the authority to accept such a complaint. (RX-6, pp. 22-24).

On cross-examination, Mr. Matias testified his business cards no longer include his title because a new individual was hired for that position after the consolidation of two different companies. Mr. Matias recalled stating he was an OSHA-authorized trainer, but denied ever stating he was an agent of OSHA. Although another consultant attended the meeting with Complainant and his counsel, it would not be possible that the other consultant would have represented he would forward a copy of Complainant's July 11, 2002 letter to OSHA. (RX-6, pp. 24-26).

At times, people have confused individuals at ESC with OSHA; however, if Mr. Matias ever represented himself as an OSHA officer he would be "in trouble." He could face penalties, and his company could "be shut out of business if we did that . . . We're working with the employer to help them avoid getting in trouble with OSHA as far as their safety and so forth." (RX-6, pp. 26-27).

The individual who owns ESC is located in San Antonio. The secretary who worked for Mr. Matias in July 2002 no longer works for ESC, having left "just before Thanksgiving." (RX-6, pp. 27-28).

Mr. Matias testified nobody has ever confused him with Kathryn Delaney, the area manager of OSHA. He admitted some paperwork and internet materials indicate ESC "will [provide] OSHA training in accordance with OSHA regulations." Mr. Calderon, who attended the

July 11, 2002 meeting between Mr. Matias and Complainant and his counsel works out of Fort Worth, Texas. (RX-6, pp. 28-30).

On re-direct examination, Mr. Matias stated that, when an individual such as himself becomes confused with OSHA, ESC employees explain the difference between their company, which provides employers and their employees with compliance assistance with OSHA regulations, and OSHA, which investigates and performs compliance audits. He recalled offering such an explanation to Complainant and his counsel at the July 11, 2002 meeting. (RX-6, pp. 30-32).

On re-cross examination, Mr. Matias described the compliance assistance his company performs. They investigate and report non-compliance with OSHA regulations. The report is strictly confidential and never forwarded to OSHA. (RX-6, pp. 30-32).

Mr. Matias testified, "When you call up OSHA, they've got a general number," which reaches a duty officer, who will receive questions regarding OSHA compliance. If he has a specific case, Mr. Matias may sometimes contact a specific OSHA representative. (RX-6, pp. 32-33).

Christopher Jeremiah

Mr. Jeremiah testified under subpoena at Complainant's request. He has worked for Respondent for five years. He has driven runs for employer to and from Dallas, Texas to Stanton, Houston and San Antonio, Texas. He has driven to "Moskogie," Memphis, Tennessee, and "Prescott." He has never run a sleeper cab on the San Antonio or Stanton runs, nor has he ever believed a sleeper cab was necessary for the runs. (Tr. 125-129).

Mr. Jeremiah acknowledged Respondent provides a trip sheet indicating a run from San Antonio to Dallas is assigned minimum and maximum driving times of five hours and five hours and fifty minutes, respectively. According to Mr. Jeremiah, the times indicated on Respondent's trip sheets represent "strictly driving;" however, traveling at the speed limit, Mr. Jeremiah stated it is possible to complete the trip from San Antonio to Dallas in four hours and forty-five minutes, which "beat[s] the five hours by fifteen minutes." (Tr. 128-131; CX-172)

According to Mr. Jeremiah, the times provided in Respondent's trip sheets do not include pre-trip inspections or preparations. Mr. Jeremiah, who only drove "double" trailer rigs, estimated hooking-up and conducting a pre-trip inspection each take fifteen

minutes, for a total of thirty minutes for both tasks. Including pre-trip preparations, a round-trip between Dallas and San Antonio would be "right at the ten-hour limit."[20] (Tr. 132-134).

Mr. Jeremiah, who is not a mechanic and never adjusted his vehicle's governor, testified he completed all of his round-trip runs between Dallas and San Antonio as well as the round trips between Dallas and Stanton within the ten-hour limit. Although the total round trip between Dallas and Stanton is eighty miles longer, there is less traffic than between Dallas and San Antonio which allows a quicker trip. (Tr. 136-140).

Mr. Jeremiah was involved in an accident on March 7, 2002, when his truck lost traction on ice while he was attempting to traverse an incline. He noted, "once you lose traction on your drives, there's nothing you can do." He denied exceeding the ten-hour driving limit when the accident happened. (Tr. 140-142).

Mr. Jeremiah understands the term "work your logs," which he has heard other people use "on the radio." He has never heard the term used by Respondent. (Tr. 142-143).

On cross-examination, Mr. Jeremiah agreed a round trip between Dallas and Stanton would require an average speed of 63 miles per hour. He admitted Respondent's trip sheets do not specifically indicate whether the times are "strictly driving" time. He agreed that somebody who prepared Respondent's trip sheets would better understand their meaning. He experienced no problems completing his runs between Dallas, San Antonio and Stanton. He denied fatigue or any alleged violation of maximum driving times was a factor in his March 7, 2002 accident. He denied ever being told to manipulate his driving logs, but would not comply with such an instruction because it is illegal, and his integrity is more important to him than his driving logs. (Tr. 143-145).

On re-direct examination, Mr. Jeremiah testified he never observed nor heard of anybody being reprimanded for their log books. He never heard any manager of Respondent instruct anybody to "work your logs." (Tr. 145-147).

On re-cross examination, Mr. Jeremiah explained driving logs are to be completed and submitted into a driver's box at Respondent's terminal. He expressed familiarity with exceptions to

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[20] Complainant testified he was in the "same position" as Mr. Jeremiah, and had to "work my logs." (Tr. 260-261).

the ten-hour and fifteen-hour rules, such as exceptions for adverse driving conditions. (Tr. 147-148, 150-151).

According to Mr. Jeremiah, he would call Respondent's "central dispatch," pursuant to Respondent's instructions, if he could not complete a trip without violating the ten-hour or fifteen-hour rules. On such occasions, he has called Respondent, which instructed him to go to a motel. He was not told to continue driving. (Tr. 148-149).

On questioning from the undersigned, Mr. Jeremiah explained driving time identified on Respondent's trip sheets begins "when I get hooked up and leave out the yard." On a trip from Dallas to Stanton, in which Respondent identifies a five-hour and forty-five minute minimum driving time, he would have that amount of time to reach Stanton. Likewise, he would be expected to complete the return trip in the same amount of minimum time. (Tr. 152-153; CX-102).

On further questioning, Mr. Jeremiah explained "driving time" means "time behind the wheel" of the truck. He admitted he actually completes trips in less time than that which is indicated on Respondent's trip sheets, and admitted he does not know exactly what the terms "minimum time" and "maximum time" mean. He has never thought Respondent's driving runs do not comport with the FMCSR. Rather, he is of the opinion that Respondent's trip sheets comply with the FMCSR. (Tr. 153-156).

Cecil Howard Lane

Complainant tendered Mr. Lane as an expert on the Federal Motor Carrier Safety Regulations. (Tr. 57). Mr. Lane has some college education and drove trucks and heavy equipment when he was "in the service." He attended a variety of continuing education courses, including commercial vehicle safety and enforcement, accident investigation reconstruction, master planning for motor carriers, night driving, fatigue and driver wellness. He has taught continuing legal education courses. He investigated or assisted in the investigations of "somewhere between 850 and a thousand accidents" and their causes on behalf of the State of Arizona and the U.S. Government. Respondent objected to the introduction of Mr. Lane's opinions as expert opinions, arguing they were not necessary for a resolution of the instant matter. (Tr. 44-54; CX-1; CX-2; CX-3).

Mr. Lane has testified as an expert in state court matters involving serious vehicular accidents; however, Mr. Lane has never

testified in any cases arising under the Act based on facts such as those presented in the instant matter. Mr. Lane "never met a truck driver that has come forward and complained" about safety in the trucking industry. He admitted he is not familiar with the Act. Accordingly, Complainant's tender of Mr. Lane as an expert was rejected; however, Mr. Lane's qualifications of record were accepted and his lay opinions, which might be useful for a resolution of the matter, were allowed. (Tr. 58-60, 78-80).

Mr. Lane considered Complainant's driving log for March 14, 15 and 16, 2002. He noted Complainant would exceed his limitation of 15 hours of driving and on-duty (but not driving) time by continuing to drive past 9:00 a.m. on March 15, 2002. He was required under the regulations to either go into a sleeper berth or off-duty status until he was sufficiently relieved of duty long enough to resume driving. According to Mr. Lane, Complainant's delay of freight was an invalid reason for termination because "a late delivery is something that is not unusual" in the trucking industry. Respondent could simply have called its clients, explained the delay, and arranged alternative transportation. Mr. Lane was unaware whether Respondent contacted its "clients." Based on hearsay conversation provided by Complainant and Mr. Morrison, Mr. Lane concluded Complainant properly called Respondent to report his anticipation of a late arrival. (Tr. 80-86; CX-113; CX-114).

On cross-examination, Mr. Lane admitted he did not know if Complainant ever submitted his driving logs from March 14, 15 and 16, 2002 to Respondent. He conceded Mr. Morrison appropriately directed Complainant to get sleep before returning to Dallas. He noted drivers are to keep their logs current as they drive. (Tr. 86).

Mr. Lane expected any meeting Complainant might have attended while on-duty (not driving) to be documented. There is documentation of Complainant's March 14, 2002 meeting with Mr. Morrison and Mr. Vincent that resulted in an interview report, but there is no documentation regarding Complainant's alleged safety meeting after 7:45 p.m. Because a truck inspection normally takes "about 30 minutes" for a "tractor and a set of doubles," Complainant's alleged safety meeting lasted "for about an hour and 45 minutes" according to Complainant's log. (Tr. 87-90; CX-113).

Complainant reached San Antonio in five hours at 3:00 a.m., March 15, 2002. At that time, he had logged nine hours of on-duty time. From 3:00 to 5:00 a.m., Complainant logged two hours of on-duty time, but there is no documentation he had any responsibility for his truck or was otherwise responsible to Respondent. Mr. Lane

conceded he did not know whether Complainant had any responsibility during this time. Mr. Lane was provided copies of other driving logs for trips Complainant made from Dallas to San Antonio, and agreed Complainant logged his time in between arrival in San Antonio and departure from San Antonio as off-duty time. Each period of off-duty was two hours or more. (Tr. 90-97; EX-5, pp. 26, 30, 91, 97; CX-113; CX-114).

Not all of Complainant's time sheets were accurately completed or signed; however, Mr. Lane had no reason to believe the time sheets were not Complainant's nor that Complainant failed to reach destinations he omitted on his time sheets. Mr. Lane failed to investigate the accuracy of Complainant's two-hour period of on-duty time reported for March 15, 2002, but was "just taking his driving log as true." (Tr. 95-97; EX-5, pp. 26, 30, 91, 97; CX-113; CX-114).

Assuming Complainant's driving log for March 14 and 15, 2002 was accurate, Mr. Lane agreed Complainant could drive four hours from San Antonio before he would be required to rest eight hours. Because of Complainant's familiarity with the trip and his obligation and requisite ability to understand the regulations, he reasonably should have realized he could drive four more hours before he would be required to rest. He reasonably could have informed Respondent of his time limits before departing San Antonio. (Tr. 97-100).

Other than hearsay testimony, Mr. Lane had no documented evidence Complainant contacted Respondent regarding his time constraint. He agreed Complainant was "certainly well in excess of the 15-hour rule" by remaining on-duty until 3:00 p.m. on March 15, 2002. He noted it was "inconsistent" that Complainant would take at least six hours to drive from San Antonio to Dallas when it took him five hours to drive from Dallas to San Antonio. He agreed that there is a discrepancy between Complainant's trip log, which indicates Complainant arrived in Dallas at 2:30 a.m., March 16, 2002, and Mr. Morrison's testimony, which indicates Complainant arrived in Dallas at 3:30 a.m. Mr. Lane made no attempts to verify the accuracy of Complainant's trip logs. (Tr. 100-105).

Mr. Lane had no knowledge that any driver for Respondent falsifies logs nor whether Respondent directs its drivers to falsify logs. (Tr. 107). He opined Respondent's round trip between Dallas and San Antonio was legal, but stated the run may become "illegal" depending on a vehicle's speed and "additional things that may occur." He acknowledged an extra two hours may be allowed to complete a trip because of adverse driving conditions,

and admitted he has no knowledge of the speeds Respondent's trucks attain. (Tr. 118-119).

Mr. Lane agreed a truck must average speeds in excess of 64.2 miles per hour to complete a 642-mile trip within ten hours, and understood Respondent's trucks were governed at speeds between 62 and 69 miles per hour. He admitted a sleeper cab, which "in and of itself does not make a run legal," is not necessary to remedy situations when drivers run out of hours. Resting at hotels is a viable alternative. (Tr. 119-120).

On re-direct examination, Mr. Lane explained that Respondent's Dallas/Albuquerque and Dallas/Birmingham runs would be difficult to complete within Respondent's allotted time constraints. For instance, the Dallas/Birmingham run may be completed between 13.25 and 14.25 hours, either of which would violate the ten-hour rule if a driver was expected to drive the entire time. The run would also be difficult to complete within the fifteen-hour rule. If a driver was expected to include pre-trip inspection and other on-duty time, the allowed time to complete a trip would be reduced, which would further diminish the likelihood of completion within the ten-hour or fifteen-hour rules. Depending on the speeds at which Respondent's trucks are governed, weather conditions, and time of day, a driver could reasonably suspect he was in danger of timely completion. (Tr. 108-109).

Brian Stoddard

Mr. Stoddard is Vice President of Safety and Personnel for Respondent, with whom he has worked for thirty-four years. He reports to Joel McCarty, Respondent's general counsel. He is certified by the North American Training Management Institute and is a member of the American Trucking Association. He estimated Respondent operates 2,000 trucks, of which "at least a couple of hundred" are sleeper cabs that are "mainly for team operation, two drivers." (Tr. 328-330, 359).

Among various cargo it transports, Respondent periodically transports combustible material, which includes "flammable [material], compressed gas, and paint materials," as well as corrosive materials, but has never transported explosive materials. Respondent "very strongly" encourages its drivers to seek rest at a hotel or motel if a driver feels he exceeded the amount of hours he could drive. (Tr. 331-333).

Mr. Stoddard described Complainant's termination as a "joint decision" with Mr. Morrison and Mr. Vincent in which he exercised

ultimate decision-making authority. The main reason Complainant was terminated was that he caused a delay of freight. Other factors considered were Complainant's failure to submit his driving logs upon completion of his trip on March 16, 2002 and his "out of control" behavior, including outbursts and uncontrolled temperament, during March 12 and 13, 2002. (Tr. 337-339).

Mr. Stoddard also noted that Complainant "had taken over 21 hours to travel 275 miles," which, absent a mechanical breakdown, is unreasonable even if a driver needed to stop for eight hours of rest. Assuming Complainant needed time to find a hotel, check in, obtain eight hours of rest, take a shower, and stop to eat, he should have completed his trip in no more than eighteen hours. (Tr. 369-370, 372). Complainant was not terminated in any respect because of any reports he made regarding driving runs allegedly in violation of the FMCSR. (Tr. 372-373).

Mr. Stoddard had "no doubt" Complainant requested a sleeper cab at some point on either March 12 or 13, 2002. He did not know why Complainant desired a sleeper cab, which was not necessary for his runs. (Tr. 348-350).

According to Mr. Stoddard, Respondent's employees are obligated to comply with the Federal regulations. Drivers are given a copy of the Federal regulations, which is also in the driver's handbook, and are required to complete logs accurately. Failure to accurately complete a driving log would result in a driver's reprimand. (Tr. 360-362).

Mr. Stoddard indicated trip sheets with estimated minimum and maximum times indicated thereon are not intended to establish drive times, nor do they have anything to do with FMCSR. Nevertheless, the trip sheets are "legal" according to Mr. Stoddard, because they are generated by the safety department in a vehicle with an accurate speedometer, "usually following another truck" from "gate to gate," which allows the safety department to "make speed increases that a truck would." Thus, the safety department insures against violations of the ten-hour rule. Mr. Stoddard stated the trips at issue in this matter meet the Federal regulations. (Tr. 360, 362-365).

According to Mr. Stoddard, Respondent's minimum time to complete a trip is "the minimum time that a driver should be able to make that trip. The maximum time is, if he's not there by that certain time, then . . . there might be cause to look for him." On-duty time required for drivers to perform pre-trip inspections of their vehicles and hooking up at the terminal and preparing to

depart a location is not included in the minimum time. Respondent's minimum time for a trip from Dallas to San Antonio and back to Dallas "would be ten hours." (Tr. 374-375).

Mr. Stoddard conceded that a trip sheet which indicates a minimum time of 13 hours and 25 minutes could not be accomplished in ten hours if the minimum time represented actual driving time. He noted that Respondent's thirteen-hour and 25-minute minimum time to complete a 639-mile run from Dallas to Birmingham would indicate a driver should maintain an average speed of 48 miles per hour, which is lower than the speeds reached by Respondent's trucks that travel up to 69 miles per hour. He anticipated such a trip to take ten hours at an average speed of 63.9 miles per hour. The extra hours on Respondent's sheet "could represent" breaks and meals. (Tr. 377; CX-82).

Jim Amos

Mr. Amos is a terminal operations manager in Dallas who oversees dock operations and terminal operations at night for Respondent. (Tr. 406-407).

Complainant never complained to Mr. Amos about the legality of Respondent's runs, nor did he submit any written complaint which Mr. Amos refused to accept. (Tr. 407-408).

In March 2002, Mr. Amos recalled a confrontation with Complainant, who demanded a sleeper cab for no apparent reason. Such cabs are not designed for individual drivers. Rather, they are for teams of drivers assigned to the same run. If Respondent is out of equipment, a sleeper cab may be used by individual drivers; however, drivers are not automatically entitled to sleeper cabs if the equipment is available. Sleeper cabs would not make illegal runs legal. (Tr. 408-410).

When Mr. Amos denied Complainant's request, Complainant stated he would take one without approval. Mr. Amos responded that he would call "911" to have Complainant stopped. At that, Complainant became very angry and belligerent, but did not become physical. Complainant made no sense and was "just rambling around." (Tr. 408-410).

Mr. Amos directed Complainant to take the matter up with Ray Rhodes, the line driver dispatcher present at the time. Complainant refused to speak with Mr. Rhodes, who relieved Complainant from driving that night, because "he did not think [Complainant] was in any condition to be out driving." Mr. Amos

agreed with Mr. Rhodes's conclusion, because Respondent does not want "irate people out on the highway, [which] would be very dangerous to the public and himself." Although he assumed Mr. Rhodes removed Complainant from duty to send him home, Mr. Amos did not know what Mr. Rhodes told Complainant. (Tr. 410-413).

After the confrontation, Mr. Rhodes prepared and sent an e-mail to Tony Morrison at Mr. Amos's suggestion. Mr. Amos did not help prepare or read the e-mail, nor did he receive a copy. He agreed with the e-mail if it discussed Complainant as "out of control," arguing for a team tractor, and approaching a "nervous or postal breakdown." (Tr. 413-414).

Mr. Amos was not cross-examined.

Ronald Guy Weigle

Mr. Weigle is a line haul driver who has been moving freight between Dallas and San Antonio regularly for the last six years. Respondent's runs between the two cities have never caused him to violate the ten-hour, fifteen-hour, or seventy-hour rules. He typically completes the run from Dallas to San Antonio in "about four hours and 15 minutes to four and a half hours." After arriving in San Antonio, Mr. Weigle is off-duty until he receives a dispatch to return to Dallas. On the return trip, the run will take longer because of early morning traffic through Austin. Depending on the heavy traffic in Austin, the return trip may take nearly five hours to complete. (Tr. 415-418).

Mr. Weigle could not recall attending a safety meeting on March 14, 2002. If he watched a video with another driver and took a test, he would remember the event "for sure." He would not have been paid for such a meeting, which would not be logged on a trip log because it is not considered on-duty time for line haul drivers. (Tr. 419-420).

On March 14, 2002, Mr. Weigle departed Dallas at 10:45 p.m. and completed a run to San Antonio in "four and a half or four hours [and] 45 minutes." Upon arrival, Mr. Weigle went off-duty and took a break in the break room, where he read the newspaper, ate lunch, and drank coffee. Nothing requires drivers to leave the break room. Until drivers receive a dispatch, time may be used at their discretion. According to Mr. Weigle, all line haul drivers are treated in the same manner regarding the use of their time while awaiting a new dispatch. (Tr. 420-422).

At 5:45 a.m., Mr. Weigle departed for Dallas from San Antonio. He encountered the "normal traffic," and was not hindered by rush hour traffic. He arrived in Dallas at 9:45 a.m., and recalled nothing which would cause a driver to take four hours to travel from San Antonio to Temple, Texas. (Tr. 422-423).

During his return trip, Mr. Weigle recalled passing one of Respondent's trucks on the side of the road, where the driver was asleep at the wheel. The driver appeared to be Complainant, who either left San Antonio before he did or passed him along the way while Mr. Weigle stopped for coffee. He unsuccessfully attempted to raise the driver over the radio. When Mr. Weigle arrived in Dallas, Mr. Morrison asked him if he saw Complainant anywhere, and he responded that he thought Complainant was taking a nap on the side of the road. Mr. Weigle was not asked by Respondent to "keep an eye on Complainant." (Tr. 423-427).

Mr. Weigle has had no problems with Respondent, but noted its open door policy to handle complaints, which may be communicated to anybody in management at the main office in North Carolina. Respondent's complaint policy is displayed on bulletin boards in its break rooms in all of its terminals. (Tr. 427-428).

On cross-examination, Mr. Weigle stated he was unfamiliar with the term, "work your logs." He denied that passengers in a cab maintain on-duty status, except for the limited situation where a passenger is a trainee or a trainer. He indicated drivers are on-duty as long as they are behind the wheel and "rolling." If a driver stops on the side of the road, he or she is either on-duty making a safety check, inspecting his or her truck or tires, or off-duty, taking a fifteen-minute break. If a driver makes such a stop he must make an entry reflecting the stop on his driving log. He confirmed he would not have logged time for a safety meeting as on-duty time. Although drivers must attend one safety meeting per month, the time is not considered on-duty. He noted drivers get paid by the mile rather than the hour, and he has never logged nor been instructed to log time for an unpaid safety meeting as on-duty time. (Tr. 428-436).

Mr. Weigle did not know how the driver of the stopped truck he passed could be anyone other than Complainant. Respondent assigned a total of three drivers to the trip between San Antonio and Dallas, including himself, Complainant and "Willie Gathray," who regularly performed the Dallas/San Antonio trip. Although he did not know Mr. Gathray's truck number, Mr. Weigle recalled Mr. Gathray "drove an International." He concluded it would not be

possible that the stopped driver could have been Mr. Gathray. (Tr. 436-439).

The only time Mr. Weigle saw Complainant during March 14, 2002 through March 16, 2002 was in Respondent's San Antonio terminal. According to the dispatcher in San Antonio, Complainant was dispatched from Dallas prior to Mr. Weigle, yet failed to arrive in San Antonio before Mr. Weigle. (Tr. 439-441).

Raymond C. Rhodes

Mr. Rhodes is a line haul dispatcher who supervises drivers on his shift for Respondent. According to Mr. Rhodes, Complainant is a "single extra driver" who "fills in" when Respondent has extra freight to be transported. Drivers with problems could complain to Mr. Rhodes on his shift. Complainant never complained to Mr. Rhodes nor voiced concerns about illegal runs. (Tr. 443-445).

On March 12, 2002, however, he and Complainant had a heated discussion in which Complainant wanted a team tractor, or sleeper cab, for a run that required a day cab. Complainant was "incoherent" and "out of it," as though he was approaching "some type of breakdown." Mr. Rhodes never previously observed Complainant in this frame of mind. Complainant directed his demands at Mr. Amos and refused to talk to Mr. Rhodes, who finally intervened in the conversation. Complainant did not attempt to hand Mr. Rhodes any written letter or complaint during their discussion, nor did he voice any complaint that Respondent's runs were illegal. Complainant insisted he would take a sleeper cab, but Mr. Amos responded he would call 911 if Complainant failed to take a day cab pursuant to his dispatch. The conversation finally ended when Mr. Rhodes told Complainant to take the night off, go home and spend time with his family. Mr. Rhodes sent an e-mail to Mr. Morrison describing the events of the discussion. (Tr. 445-444; RX-1, p. 8).

Thereafter, Mr. Rhodes was not involved in any discussion with Complainant, nor did he assign Complainant to attend any safety meetings, videotape programs or examinations. He would be surprised if Complainant attended a safety meeting on either March 13 or 14, 2002, because such meetings are scheduled on Saturdays for the convenience of drivers. (Tr. 454-455).

On Thursday, March 14, 2002, Mr. Rhodes dispatched Complainant on a turnaround run between Dallas and San Antonio around 10:00 p.m. Complainant regularly completed this trip on prior occasions, and Mr. Rhodes expected him to return within ten hours on the

following Friday morning; however, Complainant failed to return until Saturday morning, which was unusual. He did not speak with Complainant during the trip, nor did he speak with anyone who saw Complainant during the run. (Tr. 457-458).

According to Mr. Rhodes, drivers submit their driving logs into a box in the break room at Respondent's terminal. The box is never locked, and all the drivers know where the box is located. No driver is ever locked out of the opportunity to submit a driving log, because everybody has a gate key, and there is no lock on the break room door. So, "if he's able to get his truck into the terminal . . . he would have been able to get into the area where he turns in his logs." (Tr. 458-460).

On cross-examination, Mr. Rhodes acknowledged Complainant never had any negative write-ups, reprimands or verbal warnings. He never received a copy of Complainant's letter to Respondent. According to Mr. Rhodes, Complainant associated the legality of Respondent's runs with the use of a sleeper cab. Without the sleeper cab, Complainant concluded Respondent's runs were illegal. (Tr. 460-465).

On re-direct examination, Mr. Rhodes testified he never instructed Complainant to falsify logs, nor did he ever use the phrase, "work your logs." (Tr. 465).

John Eber Vincent

Mr. Vincent is Respondent's terminal manager in Dallas. He is involved in every termination decision at the Dallas terminal. He became involved with Complainant's termination when he received a copy of an e-mail from Mr. Rhodes on the morning after Complainant's confrontation and subsequent relief from duty over the use of Respondent's equipment. (Tr. 467-471).

At least a week prior to the March 12, 2002 confrontation, Complainant requested permission from Mr. Vincent to use a sleeper cab, but did not complain that any of Respondent's runs were illegal. Mr. Vincent informed Complainant such trucks were for team use, but might become available if Respondent was "short of single trailers." As long as Mr. Morrison cleared such a request, Complainant might be allowed to take a sleeper cab, which would not be necessary for a line haul driver out of Dallas. (Tr. 470-471, 473-474).

According to Mr. Vincent, Respondent maintains an open door policy regarding complaints, which are encouraged and may be

reported by any employee to any level of management to the chairman of the board and the board of directors. The policy is displayed on large posters around the terminal and in the employee break room. Employees are reminded of the policy in monthly meetings. (Tr. 472-473).

Mr. Vincent indicated a single driver, like Complainant, has no need for sleeper trucks, and is expected to call Respondent, who would provide him with a motel at its expense, if he "caught himself out on the road and was about to exceed the ten-hour, fifteen-hour, or seventy-hour rules. Respondent would not encourage drivers to exceed driving limits on such occasions, nor would it encourage drivers to falsify driving logs. Mr. Vincent was not aware of Respondent directing Complainant to falsify his logs or face termination. If Complainant was told to falsify his logs, Respondent would want to know of the action and correct it. (Tr. 475-476).

On the morning of March 13, 2002, Mr. Vincent met with Mr. Morrison regarding Mr. Rhodes's e-mail, which was "surprising," and considered "serious" because "there could have been harm done based on the reaction of [Complainant]." From the e-mail, he noted Complainant apparently requested a sleeper truck, which would not make the round-trip run between Dallas and Stanton a legal run because drivers could obtain accommodations at hotels at Respondent's cost if rest was necessary. Mr. Morrison and Mr. Vincent agreed to speak with Complainant "to get his side of the story." Consequently, Mr. Morrison called Complainant to arrange a meeting, but Complainant reported he was sick and unavailable for a meeting. (Tr. 477-480).

Mr. Morrison and Mr. Vincent conferred with Mr. Stoddard, explained what had taken place with Complainant and that they intended to hear Complainant's side of the story to determine if there was anything management should know to change their understanding. If that did not happen, Mr. Vincent wanted it "clearly understood" that Complainant would be expected to perform the same tasks as "everyone else in his work classification" and would be asked "nothing more, nothing less than anyone else that was doing that job." (Tr. 480-481).

On March 14, 2002, Complainant met with Mr. Morrison and Mr. Vincent for about thirty to forty minutes at around 1:30 p.m. Mr. Vincent, who did not receive Complainant's written complaint regarding the alleged illegality of Respondent's runs, asked Complainant why all of Respondent's runs were illegal. Mr. Vincent could not understand Complainant's complaint that all of

Respondent's runs, including a 100-mile run to Waco, Texas, were illegal. Complainant was upset and insisted all runs, including Dallas to Waco, were illegal, but did not explain why, other than demand a sleeper cab or faster trucks. Mr. Vincent explained Complainant's complaints were irrational and did not indicate a problem with Respondent's runs. (Tr. 482-487).

Mr. Vincent advised Complainant that Respondent's runs were legal and that Complainant faced disciplinary action up to and including termination for failing "to do the same job as anybody else" in his work group using the same equipment. Mr. Vincent prepared an interview report, which Respondent requires to be completed upon a commendation, award or corrective interview about an issue, but Complainant refused to sign the report. Complainant received a copy of the report at the meeting and understood he might be discharged for failure to take a dispatch when he had available hours to drive. (Tr. 487-487).

Complainant departed for San Antonio before midnight on March 14, 2002, but did not return until the morning of March 16, 2002. On the morning of March 15, 2002, Complainant informed Mr. Morrison that he was out of hours and needed rest. Even with eight hours of rest in Waco, Complainant was expected to arrive in Dallas before Midnight on March 15, 2002. Mr. Vincent was not aware of any justification for the time taken to complete the trip. (Tr. 489-493).

On Monday, March 18, 2002, Mr. Morrison informed Mr. Vincent that Complainant arrived on Saturday morning, failed to submit accompanying driving logs and failed to contact Mr. Morrison after his arrival to explain the circumstances of his trip. Mr. Vincent recommended contacting Mr. Stoddard to proceed with disciplinary action, which Mr. Vincent concluded should be termination, unless there were mitigating circumstances. (Tr. 493-494).

According to Mr. Vincent, Complainant's allegations, that runs were illegal and that he refused to do anything illegal, were related to his termination insofar as the claims were "preposterous" and "ridiculous;" however, Complainant was not terminated because he refused to engage in an illegal activity. Complainant was not terminated because he had a reasonable apprehension that his conduct required by Respondent would cause harm to himself or others. Rather, Complainant was terminated for delaying freight, due to his 21.5-hour return-trip between San Antonio and Dallas, which should have taken less than ten hours of actual driving time. "Clock time," according to Mr. Vincent,

indicates the entire round-trip between Dallas and San Antonio takes eleven and a half hours. (Tr. 494-496).

Including eight hours of rest, Mr. Vincent testified that the entire round-trip between Dallas and San Antonio should have taken no more than twenty hours. Complainant should have arrived on the evening of March 15, 2002, when his freight could have been timely transferred to other trailers. Because dock workers were not working when Complainant arrived, his freight could not be transferred until the next rotation of workers arrived later in the morning. (Tr. 496-497).

Drivers who are out of hours in Waco may proceed to Respondent's Waco terminal. Respondent requires its terminals to find hotel rooms for workers who are out of hours and never requires drivers who are out of hours to find their own accommodations, and Complainant knew there was a terminal in Waco. Respondent would require Mr. Vincent to "drive a hundred miles to get [Complainant] before they'd let him walk around the streets of the city." If Complainant incurred out-of-pocket expenses to stay at a hotel, Respondent would reimburse him and Mr. Vincent would receive the receipt. If Complainant or his wife submitted a receipt, Mr. Vincent would sign for it. He has never seen or approved any hotel receipt for Complainant's stay in Waco. (Tr. 497-498, 500).

According to Mr. Vincent, no other drivers have ever complained that Respondent's runs were illegal. All of Respondent's runs from Dallas to Stanton, El Paso, Albuquerque, Birmingham, and San Antonio continue to be run. Complainant failed to submit his driving logs for his last trip. (Tr. 481-482). He is unaware of any justification for the 21.5 hour length of Complainant's round-trip between Dallas and San Antonio, nor is he aware of any reason Complainant failed to submit his driving logs upon completion of the trip. (Tr. 490, 497).

Mr. Vincent, who is responsible for arranging safety meetings, testified no safety meetings occurred on March 14, 2002. His meeting with Complainant earlier in the day on March 14, 2002 did not last an hour and forty-five minutes, and Complainant was not required to wait for Mr. Morrison and Mr. Vincent to meet with them. Based on his review of Complainant's logs, Mr. Vincent was aware of no reason for Complainant to remain on-duty, not driving for three hours and fifteen minutes before he checked-in to a hotel room in Waco. (Tr. 498-499).

On cross-examination, Mr. Vincent acknowledged he did not see Complainant again after March 15, 2002. He did not review Complainant's driving logs, nor was he aware if anybody else reviewed them before a decision to terminate was reached. He admitted Respondent's response to Complainant's complaints was that its runs were legal, and Complainant would be disciplined or possibly terminated for failure to comply. He admitted he discussed a sleeper cab with Complainant, who was not approved for such a truck. He acknowledged Respondent carries hazardous cargo, corrosives, and explosives. (Tr. 501-506).

On re-direct examination, Mr. Vincent testified he is not an explosives expert, but Respondent carries "the lowest grade of explosives," possibly including firecrackers. He stated a review of Complainant's driving logs, which made no reasonable sense, would not change his recommendation to terminate Complainant, whose termination was not based on any complaint that his runs were illegal or on any reasonable apprehension about safety. (Tr. 506-507).

Tony Morrison

Mr. Morrison is the assistant terminal manager who hired Complainant. He received no complaints regarding Respondent's runs from Complainant prior to March 2002. Likewise, no other drivers ever complained of Respondent's runs according to Mr. Morrison. (Tr. 508-509).

Although he is not a driver for Respondent, he is familiar with its runs from his experience based on mileage and logs submitted on behalf of hundreds of thousands of runs over time. None of Respondent's runs violate the ten-hour, fifteen-hour, or seventy-hour rules. He confirmed Respondent maintains a policy to investigate complaints regarding the legality of its runs. (Tr. 509-513).

On March 13, 2002, at approximately 5:00 a.m., Mr. Morrison received a letter from Complainant addressed to Mr. Amos. Complainant demanded a sleeper cab. He informed Complainant he would check into the matter and contact him later in the day. He reviewed driving logs for all of Respondent's runs and concluded they were legal, based upon established running times and standards. He was unaware of any supervisor directing drivers to falsify logs to cover illegal runs, which would warrant "severe consequences" for the supervisor. Complainant never complained to Mr. Morrison of such behavior. (Tr. 513-516).

After he reviewed Respondent's runs, read Mr. Rhodes's e-mail, contacted Mr. Vincent and informed Mr. Stoddard of the circumstances, Mr. Morrison contacted Complainant around 9:30 a.m. on March 13, 2002 to invite Complainant to a meeting to discuss the matter. Complainant reported he was ill and was unable to attend a meeting. On the following day, Mr. Morrison reached Complainant and arranged a meeting for 1:00 p.m, for Complainant to discuss the situation with Mr. Vincent and Mr. Morrison. The meeting began at 1:30 p.m., because Complainant was thirty minutes late. The meeting lasted no more than thirty minutes. (Tr. 516-519).

At the meeting, Complainant was provided an opportunity to explain why Respondent's runs were illegal, but only demanded a sleeper cab. His complaints made no sense to Mr. Morrison, who noted a sleeper cab would not make an illegal run legal. Mr. Morrison explained to Complainant that the runs were legal and that Complainant was expected to complete his runs. Complainant refused to sign an interview report. The meeting concluded around 2:00 p.m., when Complainant left the terminal. (Tr. 519-523).

According to Mr. Morrison, Complainant's logs were not truthful regarding the alleged March 14, 2002 safety meeting. Complainant was not scheduled to attend a safety meeting on March 14, 2002, and his training was current, which meant he was not scheduled for further training for another year. Mr. Morrison noted no safety meetings were scheduled until March 27, 2002. If Complainant was required to attend a safety meeting, watch a videotape, or take an examination, it would be documented. There are sign-in forms which a driver must complete to acknowledge they attended a safety meeting. If drivers attend a required safety meeting, they are provided a certificate which is kept in their employment files. There is no documentation regarding any safety meeting attended by Complainant on March 14, 2002. (Tr. 524-526).

On March 15, 2002, at 9:30 a.m., Mr. Morrison received a call from Complainant, who reported he was out of hours in Waco, Texas. At the hearing, Mr. Morrison reviewed Complainant's March 15, 2002 log, which Mr. Morrison had not previously seen because Complainant failed to submit his driving log upon his return to Dallas. The log indicated Complainant did not reach Waco until 10:30 a.m. after he was out of hours. Mr. Morrison does not know how Complainant reached Waco after he was out of hours. (Tr. 526-528, 532; RX-1, p. 4; CX-113).

Allowing time for Complainant to travel to a hotel room and rest for eight hours, Mr. Morrison expected Complainant to arrive in Dallas no later than 8:30 p.m. on March 15, 2002. Had

Complainant arrived at that time, his cargo would have been timely transferred to other trailers for transportation to the next destination. Because no dock crew was working when Complainant arrived on the morning of March 16, 2002, his cargo could not have been timely transferred. (Tr. 530-531).

Although Complainant's driving log indicates a 2:30 a.m. arrival on March 16, 2002, an electronic tracking system indicates his equipment reached the gate in Dallas at 3:30 a.m. The terminal is not locked in such a way that Complainant, who failed to submit his logs, would have been precluded from submitting his driving logs. Respondent requires drivers to submit their logs upon completion of their trips. (Tr. 531).

Mr. Morrison was unaware of any reason a driver would be required to be on-duty, not driving for three hours and fifteen minutes while waiting on a hotel room. He explained a driver would be relieved of duty while waiting for a hotel. He added drivers could drive to Respondent's Waco terminal, where Complainant has been "many times," and simply drop their equipment at that location. The Waco terminal would assist making arrangements for hotel accommodations and drive drivers to hotels. (Tr. 534)

Mr. Morrison thinks Complainant fabricated his driving logs because no safety meeting occurred on March 14, 2002, Complainant spent three hours looking for a hotel room in Waco, and because Complainant returned to the Dallas terminal later than he reported. He explained Complainant unreasonably failed to contact him over the weekend to explain the circumstances of his trip. Mr. Morrison discussed Complainant's actions with Mr. Stoddard and Mr. Vincent on March 18, 2002. They discussed Complainant's 21.5-hour travel time between San Antonio and Dallas and his failure to submit log sheets or freight bills, which are necessary for tracking freight.[21] It was determined that Complainant would be terminated for delay of freight. Allegations of illegal runs were unrelated to the decision to terminate. (Tr. 535-536).

According to Mr. Morrison, Complainant unreasonably took eighteen hours to complete the two-hour run from Waco to Dallas. Mr. Morrison called Complainant at 9:00 a.m. on March 18, 2002 and asked him about the trip between Dallas and San Antonio.

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[21] Because Complainant did not submit his freight bills, which Respondent requires drivers to do, Mr. Morrison had to re-create them using the electronic tracking system which indicated Complainant arrived at 3:30 a.m. (Tr. 538).

Complainant stated, "I just had a really bad day." Complainant did not explain he was delayed because of safety meetings or that he was required to work extra hours in San Antonio. He did not indicate he was delayed by traffic in Austin, nor offer any other explanations about his trip. Accordingly, Mr. Morrison informed Complainant he was terminated and would be paid all monies due. Complainant was paid; however, no receipt was ever provided to Mr. Morrison for Complainant's hotel reimbursement. (Tr. 540-542).

Mr. Morrison has never denied a driver's request for a hotel room, nor is he aware of any time Respondent denied such a request. The only time Complainant requested a hotel room from Mr. Morrison, his request was approved. (Tr. 522-523).

On cross-examination, Mr. Morrison explained delaying freight means failing to meet schedules in a timely manner. He acknowledged Complainant's driving logs regarding his final trip were never audited because they were never submitted. Complainant could have submitted the logs into a central collection agency into which Complainant submitted his logs for years. He testified he did not contact Complainant over the weekend after March 16, 2002 because "I wasn't the one who was 20 hours late." He maintained Complainant, who was provided an opportunity to explain himself, failed to perform his job duties and was terminated accordingly. He does not know whether Complainant secured hotel accommodations during his trip, because a receipt was never provided. He denied Complainant's termination was a "set-up" or a fabrication by Respondent. (Tr. 543-554).

Other Evidence

Complainant's Internal Complaint

Complainant's handwritten complaint provides:

> Jim Amos
>
> I have been working real hard for you and recently have been checking the time on each run and you have been making me drive my cargo for more ten [sic] hours which makes it illegal and breaks Federal D.O.T. laws. I have asked for a sleeper cab so I wouldn't be so tired driving, but you wouldn't allow me to have one. I have a wife and family so I cannot go to jail by breaking the law for you. I would also be put in jail if I got in a

> wreck and killed somebody because I was tired from driving more than ten hours on one day. I refuse to drive for more than ten hours on any day for you because I will not do something that would make me go to jail.
>
> [Complainant]

(RX-1, p. 7).

Respondent's Driver's Handbook

The Driver's Handbook indicates a violation of a company rule will result in counseling "by the Service Center manager or immediate supervisor, and such action taken as deemed necessary. This could be a letter of warning to dismissal, depending on the seriousness of the violation." (RX-4, p. 118).

According to the Driver's Handbook, "all trip reports must be turned in <u>each</u> time you go off-duty at your Home Service Center, along with corresponding logs . . . ." Deliberate falsifications will be considered and handled as theft, which jeopardizes job security. (RX-4, p. 79). Further, "all completed driving logs must be turned in at a domiciled terminal upon arrival and before departure on the next assignment. DOT requires logs to be kept current up to last change in status." The handbook provides:

> NOTE: [RESPONDENT] STRICTLY ENFORCES HOURS OF SERVICE REGULATIONS. THOSE WHO WILFULLY VIOLATE THESE REGULATIONS ARE SUBJECT TO DISCIPLINARY ACTION, FROM A WRITTEN REPRIMAND UP TO AND INCLUDING TERMINATION OF EMPLOYMENT.

(RX-4, p. 93).

According to the handbook, motels may be necessary, and drivers "must contact the manager or supervisor on duty to call Central Dispatch for a purchase order. If the Service Center is closed, a driver must call Central Dispatch before going to a motel." Drivers are "expected to use the designated motel in each area." (RX-4, p. 84).

Among other reasons, Respondent's drivers, who acknowledge their employment is "at-will," may be terminated for "falsification of company and/or employee records," "theft and/or dishonesty," "conduct unbecoming to that of the employee which may be detrimental to [Respondent]," "failing to comply with the company's

high value security program or other company procedures," and "unauthorized use of company equipment." (RX-4, p. 118).

Complainant's Driving Logs for March 14 through 16, 2002

At noon of March 14, 2002, Complainant was off-duty. At 1:45 p.m., he marked himself "on duty, not driving" while he was in Dallas at a meeting which lasted until 3:30 p.m, at which time he went off-duty again. At 7:45 p.m., he went "on duty, not driving" and noted a "Meeting/[pre-trip inspection]" in Dallas. He continued "on-duty, not driving" until 10:00 p.m., when he began driving. He arrived in San Antonio five hours later at 3:00 a.m. on March 15, 2002, when he dropped his cargo. (CX-113).

Complainant was "on-duty, not driving" from 3:00 a.m. until 5:00 a.m. on March 15, 2002. From 5:00 a.m. until 9:00 a.m., he was driving. He stopped in Temple at 9:00 a.m., when he went "on duty, not driving" until 10:00 a.m., when he began driving again. At 10:45, he arrived in Waco, where he went "on-duty, not-driving." He continued "on-duty, not driving" until 3:00 p.m., when he went off-duty. (CX-113; CX-114).

At 11:00 p.m. on March 15, 2002, Complainant went on duty, not driving, noting, "Waco, TX /[pre-trip inspection]" until 11:30 p.m., when he went off-duty for one hour. At 12:30 a.m. on March 16, 2002, he began driving from Waco. At 2:30 a.m., he went off-duty, but no city is identified where he went off-duty. Id.

V. DISCUSSION

A. Procedural Issues

1. Timely Filing

49 U.S.C. § 31105 provides in pertinent part:

> An employee alleging discharge, discipline, or discrimination in violation of Subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred.

49 U.S.C. § 31105 (1997). Likewise, 29 C.F.R. § 1978.102(d) provides that an employee who believes that he has been discriminated against in violation of the Act "may within [180] days after such alleged violation occurs, file or have filed by any

person on the employee's behalf a complaint with the Secretary." 29 C.F.R. § 1978.102(d) (2001). Further, 29 C.F.R. § 1978.102(c) provides:

> The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but filing with any OSHA officer is sufficient. Addresses and telephone numbers for these officials are set forth in local directories.

29 C.F.R. 1978.102(c) (2001).

As a threshold issue, the date of discrimination must be established which commences the statutory filing period. The time period for administrative filings begins on the date that the employee is given final and unequivocal notice of the Respondent's employment decision. The United States Supreme Court has held that the proper focus is on the time of the discriminatory act and not the point at which the consequences of the act become painful. Chardon v. Fernandez, 454 U.S. 6, 9; 102 S.Ct. 28, 29 (1981); Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498 (1980); See English v. Whitfield, 858 F.2d 957, 961 (4th Cir. 1988).

Complainant admitted he was terminated on March 18, 2002. The factual scenario supports a conclusion that he associated the termination with his alleged protected activity which prompted his hiring counsel and filing a petition requesting depositions in a Texas State court on March 22, 2002.

Upon review of the record, I conclude that his termination was final, definitive and unequivocal. The termination was decisive and conclusive, leaving no further chance for action, discussion or change. Thus, March 18, 2002, constitutes the date of alleged discrimination and the commencement of Complainant's filing period.

The 180th day from the date of Complainant's termination occurred on Saturday, September 14, 2002. Accordingly, he was required to file his complaint with the Secretary of Labor no later than Monday, September 16, 2002, which was the first business day after the required filing date. Since the complaint was not filed with DOL until September 18, 2002, it was clearly untimely. See Kang v. Department of Veterans Affairs Medical Center, Case No. 92-ERA-31 (Sec'y Feb. 14, 1994); Cox v. Radiology Consulting Associates, Inc., Case No. 86-ERA-17 (Sec'y Nov. 6, 1986, ALJ Aug.

22, 1986); Prybys v. Seminole Tribe of Florida, Case No. 95-CAA-15 (ARB Nov. 27, 1996).

Alternatively, Complainant appears to argue that he delivered his complaint to Mr. Matias, who was reasonably believed by Complainant to be an OSHA representative with the proper authority to receive his request or, on the other hand, an individual who agreed to file his complaint with the proper OSHA representative on his behalf. His argument is specious and without merit.

Mr. Matias's credible, persuasive and uncontroverted testimony establishes he is not now, nor was he ever an OSHA officer. He has never identified or held himself out as an OSHA representative, nor has he ever been identified in any published materials as an OSHA representative. His uncontroverted testimony establishes he never received any paperwork from Complainant nor his counsel. Rather, he provided Complainant and his counsel with the phone number and road directions for the OSHA area representative and directed them to deliver their information to her office.

Moreover, a review of Mr. Matias's video recording of his deposition reveals his demeanor and the appearance of his business attire and office, which buttresses his credibility and persuasiveness. Mr. Matias did not reasonably appear to be an OSHA representative. Nothing on his uniform or in his office indicated he was an OSHA representative or that ESC was an OSHA office. His uncontroverted testimony establishes that his appearance, office and uniform were exactly the same in his deposition as they were when he met Complainant and his attorney in July 2002. Accordingly, I find he could not have reasonably appeared to be, nor did he hold himself out to be, an OSHA representative.

Insofar as Counsel for Complainant appears to argue Mr. Matias was less than forthcoming in his deposition testimony, I find his argument unconvincing in establishing Mr. Matias represented himself as an authorized OSHA on July 11, 2002 or received any complaint to forward to OSHA. In his post-hearing brief, Counsel for Complainant specifically and correctly notes Mr. Matias denied representing himself as an OSHA agent in his deposition and acknowledged he could never represent himself as such without facing serious reprimand; however, Counsel for Complainant never disputed, challenged, or denied the veracity or accuracy of Mr. Matias's testimony when he was allowed to cross-examine the

witness.[22] Accordingly, Complainant's argument that Mr. Matias represented himself as an OSHA officer or received a complaint to forward to OSHA lacks any factual support and is without merit.

It should be noted that Complainant's counsel indicated at the hearing he anticipated Mr. Matias's presence at the hearing. (Tr. 397-405). Mr. Matias's uncontroverted, unequivocal testimony establishes he never received a request to appear at the hearing. Cross-examination failed to diminish in any way his persuasiveness and credulity regarding the events at issue.

Accordingly, I find and conclude Complainant was wholly unpersuasive in establishing Mr. Matias represented himself as an OSHA representative, received any complaint, or agreed to forward any complaint on behalf of Complainant to OSHA. Assuming **arguendo** that Mr. Matias received Complainant's complaint, which I find unsupported in the record, I find Mr. Matias was not an authorized representative of OSHA capable of receiving Complainant's complaint for the purposes of 29 C.F.R. 1978.102(c). Moreover, I find Mr. Matias was not a person who acted on behalf of Complainant under 29 C.F.R. § 1978.102(d). Accordingly, I find no merit to Complainant's argument that an alleged filing with Mr. Matias constitutes a timely filing under the Act.

2. Equitable Tolling

Complainant argues his complaint should be equitably tolled because: (1) he timely filed his claim in state court; and (2) Respondent's alleged discrimination is in the nature of a continuing violation.

29 C.F.R. § 1978.102(d)(3) provides:

> [T]here are circumstances which will justify tolling of the 180-day period on the basis of recognized equitable principles or because of extenuating circumstances, e.g., where the employer has concealed or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. The

[22] Of note, Counsel for Complainant indicated to the undersigned that there is a Latin phrase which applies to this matter: "He who is silent in the face of wrongdoing is guilty of that wrongdoing." (Tr. 17).

> pendency of grievance-arbitration proceedings or filing with another agency are examples or circumstances which do not justify a tolling of the 180-day period. The Assistant Secretary will not ordinarily investigate complaints which are determined to be untimely.

29 C.F.R. 1978.102(d)(3) (2001). Hicks v. Colonial Motor Freight Lines, Case No. 84-STA-20 (Sec'y Dec. 10, 1985). The 180-day period in which to file is not jurisdictional, but is analogous to a statute of limitations. Coke v. General Adjustment Bureau, Inc., 64 F.2d 584 (5th Cir. 1981); School District of Allentown v. Marshall, 657 F.2d 16, 19-20 (3rd Cir. 1981).

The doctrine of equitable tolling is deemed appropriate in instances where:

> (1) the defendant has actively misled the plaintiff respecting the cause of action; (2) the plaintiff has in some extraordinary way been prevented from asserting his or her rights; or (3) the plaintiff has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Smith v. American President Lines, Ltd, 571 F.2d 102, 109 (2d Cir. 1978); Allentown, 657 F.2d at 19-20.

The restrictions on equitable tolling must be scrupulously observed. Smith, supra; Allentown, supra at 19; Mohasco Corp. v. Silver, 447 U.S. 807, 825-826 (1980) (in a statutory scheme in which Congress carefully prescribed a series of deadlines measured by a number of days – rather than months or years –"we may not simply interject an additional . . . period into the procedural scheme, [but] must respect the compromise embodied in the words chosen by Congress;" [i]t is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction"); See also Lewis v. McKenzie Tank Lines, Inc., Case No. 92-STA-20 (Sec'y Nov. 24, 1992) (ignorance of the law is not a sufficient reason to toll the limitation); Clark v. Resistoflex Co., A Div. of Unidynamics Corp., 854 F.2d 762, 771 n. 4 (5th Cir. 1988) (the doctrine of equitable tolling focuses on the question of whether a duly diligent complainant was excusably ignorant of the employer's discriminatory act); Nixon v. Jupiter Chemical, Inc., 89-STA-3 @ 2 (Sec'y Oct. 10, 1990) (it is not for the Secretary to casually

ignore the legislated statutory limitation, even if it may bar what may be an otherwise meritorious cause).

The doctrine of equitable tolling is generally inapplicable where a plaintiff is represented by counsel. See Lawrence v. City of Andalusia Waste Water Treatment Facility, Case No. 95-WPC-6 (ARB Sept. 23, 1996) (citing Kent v. Barton Protective Services, Case No. 84-WPC-2 @ 11-12 (Sec'y, Sept. 28, 1990), aff'd, Kent v. U.S. Department of Labor, (11th Cir. 1991))(the doctrine of equitable tolling is generally inapplicable where a plaintiff is represented by counsel). Once a complainant is represented by counsel, he has "access to a means of acquiring knowledge of his rights and responsibilities," thereby precluding application of equitable tolling considerations. Smith, 571 F.2d at 109; See also Charlier v. S. C. Johnson & Son, Inc., 556 F.2d 761, 762 (5th Cir. 1977)(a filing period may be tolled unless or until the employee has acquired actual knowledge of his rights or acquires the "means" of such knowledge by consulting an attorney about the discriminatory act); Clark v. Resistoflex Co., A Div. of Unidynamics Corp., supra at 767-768 (citing Charlier, supra) (the issue of when an employee acquired the "means" of knowledge of his rights by consulting an attorney about a discriminatory act did not need to be reached where it could be inferred the employee had general knowledge concerning discrimination laws for some time beforehand on the day he was terminated, which was 183 days before filing his charge).

Prefatorily, it should be noted Complainant raises no allegations that Respondent has concealed or misled him regarding the grounds for his discharge. Rather, he asserts he pursued his claim "only days after his termination." I find no substantial evidence of record establishing Respondent concealed or misled Complainant regarding the grounds for his discharge, and so conclude. See Hatcher v. Complete Auto Transit, Case No. 94-STA-53 (Sec'y July 3, 1995) (although the regulations prohibit the employer from concealing or misleading the employee regarding the basis for the discharge decision, there was no evidence in the record on which to base a conclusion that the Respondent concealed or mislead the Complainant in this regard).

Likewise, Complainant, who secured an attorney shortly after his termination, does not allege he was prevented from asserting his rights in some extraordinary way. I find no factual basis in the record to support a conclusion that he was prevented from asserting his rights in some extraordinary way. As clearly noted in the regulations, addresses and telephone numbers for OSHA representatives are set forth in local directories, and any OSHA officer is sufficient for filing. The credible and persuasive

testimony of Mr. Matias establishes Complainant was provided with the identity, phone number, address, and directions to the proper OSHA officer on July 11, 2002, which is 67 days before Complainant was required to file his complaint. Accordingly, I find and conclude Complainant was not extraordinarily prevented from asserting his rights timely.

Complainant's Texas State Court Petition

Complainant has not alleged he mistakenly filed his claim under the Act in state court; however, he argues the undersigned should consider his complaint timely filed because he filed a "claim", identified as "Cause No. 02-2704, IN RE: PETITION OF TOM MCDEDE," in state court "alleging violations of transportation rules and regulations only days after his termination."

Complainant's contacts with state court may not toll the running of the limitations period under the Act if there is nothing in Complainant's pleadings or testimony to demonstrate that he "raised the precise statutory claim in issue," *i.e.*, a complaint that he was discharged in retaliation for activity protected by the whistleblower provision under the Act. Tierney v. Sun-Re Cheese, Inc., Case No. 2000-STA-12 @ 3 (ARB Mar. 22, 2001); Kelly v. Flav-O-Rich, Inc., Case No. 90-STA-14 @ 2 (May 22, 1991) (although a complainant timely filed a claim with EEOC, the case did not "fall within the limited exception allowing equitable tolling of the limitation period under the Act when the complainant timely raised the precise claim in issue but mistakenly did so in the wrong forum" because the EEOC complaint was not asserted under the STAA and thus did not involve the precise claim mistakenly raised in the wrong forum); See also Cox v. Radiology Consulting Associates, Inc., supra, (the fact that some redress was sought elsewhere than in the appropriate forum did not justify the application of equitable tolling).

On March 22, 2002, in the appropriately entitled matter of "Cause No. 02-2704, IN RE: PETITION OF TOM MCDEDE REQUESTING A DEPOSITION OF JOHN VINCE, AND TONY MORRISON," Complainant filed a "Petition Requesting Deposition to Investigate Potential Claim or Suit." The petition identifies his termination by Respondent on March 18, 2002, and specifically states:

> Petitioner **will file** a claim with the administrative agencies in accordance with state and federal law. Although suit is not actually anticipated at this time, the potential claim involves violations of the

> Texas Labor Code §§ 21 and 451, and the department of transportation rules and regulations. (emphasis added)

(ALJX-5).[23] Complainant noted that "the substance of the testimony petitioner expects to elicit from the witnesses involves discriminatory treatment and termination." He desired to take the depositions "to determine the merits of **potential** claims regarding violations of the Texas Labor Code and department of transportation rules and regulations and avoid litigation." The petition was signed by Complainant and submitted by his counsel.

In light of the foregoing, it is apparent Complainant failed to show he mistakenly raised the precise statutory claim at issue in the wrong forum. The relief he requested was the authority of the state court to depose Mr. Morrison and Mr. Vincent. He did not anticipate a suit at the time, but was investigating the merits of a "potential claim under state and federal law," implying an understanding that his state and federal claims may be governed by different laws under different theories.

In his petition for a deposition, which was submitted by his attorney 176 days before the required time in which to file his claim expired, Complainant specifically indicated an awareness of administrative agencies and governing state and federal law. He indicated a claim was not yet filed with the appropriate administrative agency, but would be in accordance with applicable law. Although he demonstrated an interest in the proposed deponents' testimony regarding discriminatory treatment and termination, he failed to articulate any claim or seek any remedies or relief under the Act. Consequently, I find Complainant failed to show that he mistakenly raised the precise statutory claim at issue in the wrong forum.

Complainant argues the undersigned should consider his complaint timely, relying on Peoples v. Brigadier Homes, Inc., Case No. 87-STA-30 (Sec'y June 16, 1988) (although a complainant filed his complaint 550 days after an alleged violation, an administrative law judge concluded that the complaint was timely because the complainant filed an unlawful termination action in the Alabama State Court within 180 days of his termination). His reliance on Peoples is misplaced. The decision in Peoples was

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[23] It should be noted the petition is associated with "Cause No. 02-2704." No supporting information or description of that cause was offered by Complainant.

reversed by the Secretary, who found that there was an absence of substantial evidence to support a conclusion that the state court action involved the **same cause of action** that formed the basis for the complaint under the Act. Peoples, Case No. 87-STA-30 @ 3.

In light of the foregoing, I find and conclude these facts are inappropriate for an application of equitable tolling. Consequently, I find Complainant's claim was not timely filed.

Moreover, at all times, Complainant was represented by counsel, who he hired shortly after his termination. In Hicks, supra, the Secretary agreed with an administrative law judge's decision to deny the application of equitable tolling, noting:

> From an early time following his discharge, Complainant was represented by counsel of his choice. He was not a "layman, unassisted by trained lawyers, initiat[ing] the process" alone and against whom a "technical reading of filing requirements is particularly inappropriate."

Hicks, supra, @ 6, (quoting Zipes v. Trans World Airlines, 455 U.S. 385, 397 (1982)(the Supreme Court declined to read literally a filing provision of Title VII)). Accordingly, in addition to the foregoing findings, I find equitable tolling is inappropriate on these facts which unquestionably establish Complainant was represented by an attorney, who filed a request for a deposition "only days after his termination," that predated the filing of his claim by more than 180 days.

Further, Complainant identified his March 18, 2002 termination on March 22, 2002, which is 176 days prior to the expiration of the time for filing a complaint. There is no substantial evidence of record which indicates Complainant or his counsel were precluded from simply referring to the local telephone directory for the contact information regarding any OSHA representative pursuant to the explicit language in the regulations. As noted above, the evidence of record establishes Complainant and his counsel were provided the identity, phone number, address, and directions to the proper OSHA officer on July 11, 2002. Consequently, I find there is no adequate basis for disregarding the time limit set forth in the statute's clear language. Allentown, supra at 21.

It should be noted Complainant further argues Respondent was "given full notice of the claims asserted against [it]" when it appeared in court to answer his petition in which a judge "agreed

with the merits." He argues that his claims were presented in "exhaustive detail to Respondent when the company managers [were] deposed."

Complainant submitted extra-record evidence with his post-hearing brief, which appears to indicate a judge presiding at an April 25, 2002 hearing on his Petition Requesting Deposition "to investigate a potential claim or suit" concluded his allegations "may have merit" and granted Complainant authority to take oral depositions of Mr. Vincent and Mr. Morrison.[24] Apparently, the deponents were ordered to produce "policies and procedures of [Respondent] that govern [Complainant's] job. Including [sic] his drive logs, time and scope of employment." Portions of the depositions of Mr. Morrison and Mr. Vincent were also submitted which discuss the deponents's recollections of the events surrounding Complainant's termination. (Complainant's post-hearing brief, exhibit 1, pp. 5-26).

Respondent's inability to cross-examine the witnesses or respond to the extra-record evidence notwithstanding, I find nothing in the new evidence which establishes Complainant mistakenly raised his precise claim under the Act in the wrong forum. As noted above, the record establishes Complainant was pursuing a "potential claim" under state law and federal laws. The depositions do not establish what claims and remedies under which laws he was seeking.

Insofar as it appears Complainant asserts that general principles of fairness mandate his complaint be considered on the merits because Respondent is not prejudiced by the application of equitable tolling, I find his argument lacks merit.

In Allentown, supra at 20, the court explained:

> [W]e may not read the clear terms out of the statute merely because the short period between the violation and the filing of the complaint did not create the risk of inadequate evidence through fading memories or loss of witnesses. The prejudice to defendant, or lack of it, is simply irrelevant when Congress has drawn a line at the point it believed claims should be barred.

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[24] There is no transcript of the hearing on Complainant's Petition For Deposition of record.

657 F.2d at 20. See also Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152, 104 S.Ct. 1723, 1726, 80 L.Ed.2d 196 (1984), ("[a]lthough absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply **once a factor that might justify tolling is identified**, it is not an independent basis for invoking the doctrine . . . ."") (Emphasis added); Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357 (8th Cir. 1984)(the absence of prejudice to an opponent does not support invocation of the doctrine of equitable tolling); Cox v. Radiology Consulting Associates, Inc., supra @ 11.

Although Respondent may have had notice regarding the request for a deposition, there is no evidence what claims were being pursued at the time of hearing on the deposition petition, as noted above. Likewise, there is no evidence establishing Respondent was aware of what remedies and claims under which law Complainant was pursuing when he deposed its managers. Thus, I find no evidence of record establishing Respondent was not prejudiced. Nevertheless, under Allentown, supra, I find Complainant's contention that Respondent was not prejudiced is unpersuasive in establishing the application of equitable tolling is appropriate.

Assuming **arguendo** that the interest of justice might be served by permitting Complainant's case to be heard, which I find is unsupported in the record, I find no equitable considerations supporting a conclusion that the limitations period should be tolled. In Allentown, the court quoted the Supreme Court in Mohasco Corp., supra:

> [e]ven if the interest of justice might be served in this particular case by [permitting this claim to be heard], in the long run, experience teaches us that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

657 F.2d at 20 (quoting Mohasco Corp., supra at 826). Accordingly, Complainant's allegation that the application of equitable tolling is appropriate in the interest of justice is unpersuasive in establishing invocation of the doctrine.

3. Continuing Violation

Complainant alleges his complaint should be equitably tolled because Respondent "is in continuing violation of the Federal Motor Carrier Safety Regulations and continues to discriminate against

protected activity." He argues Respondent continues to require drivers to surpass ten hours of driving time, pursuant to its trip sheets which refer to "actual drive time." Thus, he argues Respondent violates the regulations as "a matter of policy."

Complainant's argument that his complaint is timely as part of a continuing violation is unpersuasive. The continuing violation doctrine allows the timeliness of a complaint to be preserved where there is an allegation of a course of related discriminatory conduct and where the complaint is filed within 180 days after the last alleged discriminatory act. Berry v. Board of Supervisors of L.S.U., 715 F.2d 971 (5th Cir. 1983); Cook v. Guardian Lubricants, Inc., Case No. 1995-STA-43 @ 8-9 (Sec'y May 1, 1996)(complainant suffered discriminatory assignments in retaliation for his complaints of overweight shipments).

However, Complainant may not employ the continuing violation theory "to resurrect claims about discrimination concluded in the past, even though its effects persist." Delaware State College v. Ricks, supra; United Airlines, Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977); Frazier, supra. To establish the occurrence of a continuing violation, Complainant must show: (1) that some "independent actionable conduct" occurred during the statutory period; and (2) that he did not know and could not reasonably be expected to have realized that a prior, related discriminatory act beyond the period of limitation was itself actionable until within 180 days of the date that he filed his complaint with OSHA. Glass v. Petro-Tex Chemical Corp., 757 F.2d 1554, 1560 (5th Cir. 1985); Flor v. United States Department of Energy, Case No. 93-TSC-1 (Sec'y Dec. 9, 1994) (the Secretary found that the complainant had filed a timely complaint under the Act, and that one of the alleged adverse acts that occurred outside the statutory time limit for filing was nonetheless timely under the continuing violation theory).

In the present matter, Complainant failed to establish any "actionable conduct" occurred during the statutory period. He suffered adverse employment action when he was terminated on March 18, 2002, which is not within the statutory period. There was no intimation that his termination was subject to further appeal, review, or revocation, either in whole or in part. Complainant candidly testified he understood he was no longer Respondent's employee upon his termination. Because discrete personnel actions such as a performance evaluation or termination are viewed as having a degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, such actions are consequently not found timely under a continuing violation theory

when raised outside of the limitation period. See Diaz-Robainas v. Florida Power & Light Co., Case No. 1992-ERA-10 @ 11 (Sec'y January 10, 1996). Accordingly, I find no factual support for a conclusion that allows equitable considerations on the basis of a continuing violation theory to require an extension of the filing period.

Complainant appears to argue that he alleged and proved a "continuing violation" extending into the charge period so that he may challenge his March 18, 2002 termination as an element of the "continuing violation." Specifically, he appears to allege his termination by Respondent "sent a clear message to anyone who cannot comply with [its] time sheets or files a complaint . . . you will be fired."

His argument is analogous to the facts presented in English, supra. There, a May 15, 1984 letter from a respondent to a complaint reflecting an adverse employment action including diminished responsibility, removal from her prior occupation, and her possible layoff 90 days later was found to constitute "final and unequivocal notice of an employment decision having delayed consequences." The letter, rather than her ultimate July 30, 1984 discharge by the respondent, triggered the limitations period with respect to her claim of retaliatory termination, and her claim was deemed untimely. The court concluded:

> the May 15, 1984 decision as then effectively communicated to [complainant] was a discrete violation of [her] right not to suffer retaliatory discharge (assuming that it was so motivated). Such a consummated, immediate violation may not be treated as merely an episode in a "continuing violation" because its effects necessarily carry over on a "continuing" basis. So to hold would of course effectively scuttle all timeliness requirements with respect to any discrete violation having lasting effects--as presumably all do to some extent.

858 F.2d at 961-962.

Similarly, Complainant's termination unquestionably communicated to him a discrete violation of his right not to suffer retaliatory discharge. Such a consummated, immediate violation may not be treated as merely an episode in a "continuing violation" simply because he alleges an effect of his termination is the perception by other employees that Respondent may discriminate.

Such a conclusion would undermine timeliness requirements regarding any discrete violation having lasting effects – "as presumably all do to some extent."

Moreover, assuming **arguendo** that Respondent's trip sheets violate Federal regulations and were continually maintained after the 180-day filing period, there is no evidence such maintenance was motivated by discriminatory animus. Further, there is no evidence nor allegation that any persons who continued to work with Respondent after Complainant's termination were treated any differently than similarly situated employees.

In light of the foregoing, I find Complainant's argument that his claim should be considered timely under a continuing violation theory to be without merit. A contrary conclusion would resurrect his discrimination claim which concluded in the past, even though its effects allegedly persist. Accordingly, I find no equitable considerations which require an extension of the filing period, and conclude Complainant's claim is untimely and hereby **DENIED**.

B. Substantive Issues

Assuming **arguendo** that Complainant's claim should be considered timely, I find Complainant failed to establish his adverse employment action was the result of discriminatory treatment in retaliation for protected activities in violation of the Act.

1. Credibility

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 92-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his evidence worthy of belief." Indiana Metal Products v.NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

> Evidence, to be worthy of credit, must not only proceed from a credible source, but must,

> in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Complainant's burden of persuasion rests principally upon his testimony. His **prima facie** case is not corroborated by the testimony of other witnesses. I found Complainant generally less impressive as a witness in terms of confidence, forthrightness and overall bearing on the witness stand. I found Complainant's credibility suffers because of his testimony, which was vacillating, unsupported in the record and presented in an inconsistent manner.

Complainant testified he became frightened when he was fatigued in December 2001 due to extended trips; however, the belated presentation of his March 2002 complaint diminishes his credibility regarding his apprehension of continuing to drive Respondent's runs after December 2001. The persuasiveness of his testimony is further undermined by Respondent's documented complaint procedure, which Complainant admitted he received, read, and signed when he started with Respondent, that clearly encourages employees to report complaints to a variety of managers at different levels of management "if for some reason an individual is not comfortable with lodging a complaint with his or her immediate supervisor."

Complainant admitted Respondent maintained an open-door policy on complaints of discrimination and testified he was contemplating contact with Mr. McCarty or Ms. Marshall in North Carolina pursuant to Respondent's complaint procedure when he was terminated. His testimony indicates he was generally aware of the policy, which he could have exercised prior to March 2002. His testimony diminishes the veracity of his allegations that he was apprehensive about driving in December 2001 and could not discuss the issue until he "came up with that sleeper theory" to approach Mr. Morrison with his "delicate" concerns about safety. Complainant's testimony that he verbally approached Mr. Morrison around "Christmas 2001" with his complaint that he could not legally complete trips within ten hours is clearly inconsistent with his later statement that he came up with a sleeper theory to approach Mr. Morrison because he could not communicate his delicate concern about safety.

Moreover, Complainant indicated he could not reach Mr. Morrison promptly after he became frightened in December 2001 because he was "out of town a lot." However, Complainant candidly testified that he easily contacted Respondent's North Carolina office, where Mr. McCarty or other managers were located to receive complaints, and complained about a hotel room in Waco when Mr. Morrison was unavailable. Thus, Complainant's testimony that he could reach Respondent at its main office when his immediate supervisors were unavailable undermines the persuasiveness of his earlier testimony that he waited until he returned to town to complain.

Although Complainant denied that "the real issue of this case is that he wanted a sleeper cab," the record belies the accuracy of his denial. His written complaint specifically states he cannot drive more than ten hours and requests a sleeper cab to avoid fatigue. Likewise, he clearly agrees with Mr. Rhodes and Mr. Amos that he was prohibited from taking a sleeper cab and threatened with police intervention if he took the truck without permission, which indicates the issue of a sleeper cab was germane to his confrontation with Respondent's managers.

Complainant's testimony that Respondent promptly provided him with a hotel room on the only occasion he requested it belies his conclusion that a sleeper cab was necessary for his runs. Likewise, his witnesses failed to support his conclusion that a sleeper cab was necessary for his runs. Mr. Jeremiah noted he regularly completed his assignments within ten hours without a sleeper cab, which he believed was not necessary to legally complete the runs. Mr. Lane specifically noted a sleeper cab does not make an illegal run legal. Accordingly, Complainant's

testimony and that of his witnesses undermines the accuracy of Complainant's conclusions that a sleeper cab was necessary to ameliorate what he perceived were illegal driving assignments.

Complainant alleged he was directed to work his logs; however, he provided no documentation of such activity or demands. He identified only one instance of violating the seventy-hour rule, for which he claims he was directed to amend his logs in compliance with the FMCSR, yet he could not provide the original driving logs in support of his contention. His testimony is not corroborated by any other witness. Mr. Lane, the only witness who did not directly refute Complainant's testimony on the subject of "working" driving logs, could only admit he had no knowledge of Respondent ever directing its employees to falsify or work their logs.

Complainant argued he had copies of amended logs he prepared in response to Respondent's alleged instructions to work his logs; however, his credibility on the issue of the accuracy of any of his driving logs is severely undermined by his admission that he falsely and incorrectly recorded logs out of habit and Mr. Lane's testimony that his logs were not entirely accurately completed or signed. Likewise, Complainant's testimony that he was unable to return to Respondent's Dallas facility from San Antonio within 22 hours is not persuasive insofar as it relies upon his driving logs, which were never submitted to Respondent for verification or filing upon his return.

Complainant's testimony that he was set up by Respondent lacks any factual support. There is no documentation of any safety meeting, videotape program, or examination of record. Mr. Lane expected any such meeting to be documented. The only document Complainant attached in support of his attendance at an alleged March 2002 safety meeting was a certificate from a meeting in March 2001, which is not helpful for a resolution on the instant matter. Similarly, there is no documentation regarding Complainant's alleged assignment to tend to trailers in San Antonio, where he logged his time as "on-duty, not driving." Accordingly, I find Complainant's argument that he was set up by Respondent is not persuasive.

Complainant's testimony that he failed to consider the likelihood of exceeding ten hours of driving time until he incurred traffic in Austin, because he signed something saying he would complete his runs legally, is unpersuasive. Complainant admitted he was referring to the interview report which directed him to run legally. As explicated by Mr. Lane, Complainant was familiar with his trip between Dallas and San Antonio and reasonably should have

realized he could drive four more hours before he was required to rest and reasonably could have informed Respondent of his time considerations before departing San Antonio.

Complainant's testimony that he did not pull off the road to calculate his hours until he remembered telling Respondent he would drive legally is belied by his decision to remain on duty after he reached ten hours of driving time. Likewise, his testimony that he continued driving to Waco after he was out of hours on March 15, 2002 in Temple, Texas belies the persuasiveness of his testimony and written complaint that he refused to continue violating regulatory time constraints. On one hand, Complainant asserts he received an adverse employment action related to his refusal to drive Respondent's allegedly illegal trips on March 14, 2002; however, he argues on the other hand that he subsequently exceeded ten hours of driving time by continuing from Temple to Waco on March 15, 2002 because Respondent directed him to go to Waco and find a hotel room after he was out of hours. Mr. Lane noted Complainant remained "well in excess of the fifteen-hour rule" by remaining on-duty until 3:00 p.m. on March 15, 2002. Accordingly, Complainant's testimony that he refused to continue driving illegal runs, but continued to drive illegally, is contradictory and unpersuasive.

Complainant's failure to call "Charlie" as a witness to explicate the reasons for his delay in securing a room in Waco diminishes the strength of his allegations he was compelled to spend more than three hours securing a room by himself. Likewise, there is no factual support for a conclusion Complainant secured lodging at the place and time he indicated. Although he testified his wife brought a receipt to Respondent, Mr. Morrison and Mr. Vincent unequivocally and persuasively agree no such receipt was provided to them. The failure to call Complainant's wife to explain the fate of his receipt undermines the persuasiveness of his testimony that he obtained lodging and provided a receipt to Respondent.

Although Complainant relies on Respondent's trip sheets, which appear to indicate on their face that drivers may be expected to exceed regulatory time constraints, it is unclear what purpose is served by the trip sheets. It should be noted Complainant failed to mention the trip sheets in his written complaint to Respondent, which undermines his argument he believed Respondent's runs were illegal.

At times the trip sheets are referred to as guidelines for new hires to use to establish familiarity with trips, while they are

alternatively referred to as “clock time” or simply a means of determining when Respondent should begin searching for drivers who may be disabled or lost. The testimony of the other drivers and Respondent’s managers establishes Respondent’s runs may regularly be completed within regulatory limits, despite indications of minimum and maximum driving time on the trip sheets. Accordingly, Respondent’s trip sheets are not supportive of Complainant’s testimony that the trip sheets cause drivers to exceed maximum driving time nor helpful in a resolution of the instant matter.

On the other hand, Respondent’s witnesses were more impressive in my view. They demonstrated greater confidence and forthrightness on the witness stand. Each of Respondent’s witnesses corroborated the testimony of the other witnesses. I found their testimony to be straight-forward, detailed, and presented in a sincere and consistent manner. Their testimony buttressed the strength of Respondent’s defense and its legitimate, nondiscriminatory business reasons for its actions.

On issues germane to a resolution of the instant matter, even Complainant’s witnesses buttressed the testimony of Respondent’s witnesses. For instance, Mr. Jeremiah corroborated the testimony of Respondent’s managers, who stated its runs were legal and sleeper cabs were unnecessary for the runs in question because hotel rooms would always be provided. Mr. Jeremiah confirmed Respondent’s position that it did not direct its drivers to work their logs falsely or inappropriately. His testimony that Respondent maintained an open door complaint policy is consistent with the testimony of Complainant and Respondent’s managers, that such a policy is available for Respondent’s employees. Mr. Lane corroborated the testimony of Respondent’s managers who noted Complainant should have documentation for an alleged safety meeting. Moreover, he confirmed Respondent’s argument that Complainant, by his own logs, violated regulations by remaining on duty after he contacted Respondent to inform them he was out of hours on March 15, 2002. Accordingly, I place more probative value on the testimony of witnesses called by Respondent in the resolution of the instant claim.

2. The Statutory Protection

The employee protection provisions of the STAA provide, in pertinent part:

> (a) Prohibitions. (1) A person may not discharge an employee, or discipline or discriminate against an

> employee regarding pay, terms, or privileges of employment, because –-
>
> > (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> >
> > (B) the employee refuses to operate a vehicle because –
> >
> > > (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; **or**
> > >
> > > (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

49 U.S.C. § 31105(a). Thus, under the employee protection provisions of the STAA, it is unlawful for an employer to impose an adverse action on an employee because the employee has complained or raised concerns about possible violations of DOT regulations. 49 U.S.C. § 31105(a)(1)(A). See, e.g., Reemsnyder v. Mayflower Transit, Inc., Case No. 93-STA-4, @ 6-7 (Sec'y Dec. and Ord. On Recon. May 19, 1994). Furthermore, it is unlawful for an employer to impose an adverse action on an employee who has refused to drive because operating a vehicle violates DOT regulations **or** because he has a reasonable apprehension of serious injury to himself or the public. 49 U.S.C. § 31105(a)(1)(B).

The purpose of the STAA is to promote safety on the highways. As noted by the Senate Commerce Committee which reported out the legislation, "enforcement of commercial motor vehicle safety laws and regulations is possible only through an effort on the part of employers, employees, State safety agencies and the Department of Transportation." 128 Cong. Rec. S14028 (Daily ed. December 7, 1982). The Secretary has recognized that "an employee's **safety** complaint to his employer is the initial step in achieving this goal . . . an internal complaint by an employee enables the employer to comply with the safety standards by taking corrective

action immediately and limits the necessity of enforcement through formal proceedings." (Emphasis added). Davis v. H. R. Hill, Inc., Case No. 86-STA-18 @ 2 (Sec'y Mar. 19, 1987).

3. The Burden of Proof

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because he engaged in protected activity. A complainant initially may show that a protected activity likely motivated the adverse action. Shannon v. Consolidated Freightways, Case No. 96-STA-15, @ 5-6 (ARB Apr. 15, 1998). A complainant meets this burden by proving: (1) that he engaged in protected activity, (2) that the respondent was aware of the activity, (3) that he suffered adverse employment action, and (4) the existence of a "causal link" or "nexus," e.g., that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. Clean Harbors Environmental Services, Inc. v. Herman, 146 F.3d 12, 21 (1st Cir. 1998); Kahn v. United States Sec'y of Labor, 64 F.3d 261, 277 (7th Cir. 1995).

A respondent may rebut this **prima facie** showing by producing evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action, but rather his or her protected activity was the reason for the action. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-508 (1993).[25]

However, since this case was fully tried on its merits, it is not necessary for the undersigned to determine whether Complainant presented a **prima facie** case and whether the Respondent rebutted that showing. See Roadway Express, Inc. v. Dole, 929 F.2d 1060,

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[25] Although the "pretext" analysis permits a shifting of the burden of production, the ultimate burden of persuasion remains with the complainant throughout the proceeding. Once a respondent produces evidence sufficient to rebut the "presumed" retaliation raised by a **prima facie** case, the inference "simply drops out of the picture," and "the trier of fact proceeds to decide the ultimate question." St. Mary's Honor Center, 509 U.S. at 510-511. See Carroll v. United States Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996) (whether the complainant previously established a **prima facie** case becomes irrelevant once the respondent has produced evidence of a legitimate, nondiscriminatory reason for the adverse action).

1063 (5th Cir. 1991); Ciotti v. Sysco Foods Co. of Philadelphia, Case No. 97-STA-30 @ 4 (ARB July 8, 1998).

Once Respondent has produced evidence in an attempt to show that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason,[26] it no longer serves any analytical purpose to answer the question whether Complainant presented a **prima facie** case. Instead, the relevant inquiry is whether the Complainant prevailed by a preponderance of the evidence on the ultimate question of liability. If he did not, it matters not at all whether he presented a **prima facie** case. If he did, whether he presented a **prima facie** case is not relevant. Somerson v. Yellow Freight System, Inc., Case No. 98-STA-9 @ 8 (ARB Feb. 18, 1999).

The undersigned finds that as a matter of fact and law, Respondent has articulated a legitimate, nondiscriminatory reason for its adverse action against Complainant. Respondent contends Complainant violated its policy and conducted himself unreasonably by fabricating driving logs, allegedly failing to timely contact Respondent about meeting or exceeding his maximum driving time, failing to submit his driving logs and freight bills upon completion of his trip, failing to reasonably explain to Respondent the circumstances of his allegedly extended trip from Dallas, Texas to San Antonio and back, and for delaying freight. Respondent offered Complainant's employment record, the testimony and records of its managers that Complainant failed to perform reasonably, and its driving handbook which indicates Respondent may terminate drivers for a host of reasons and that its driving policy was based upon the FMCSRs by the Department of Transportation. (See RX-4, pp. 3, 88-95, 118). Thus, I find and conclude that Respondent met its burden of production to articulate a legitimate, nondiscriminatory basis for its adverse employment action.

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[26] The respondent must clearly set forth, through the introduction of admissible evidence, **the reasons for the adverse employment action**. The explanation provided must be legally sufficient to justify a judgment for the respondent. Upon articulating some legitimate, nondiscriminatory reason for the adverse employment action or "explaining what it has done," Respondent satisfies its burden, which, as noted above, is only a burden of production, not persuasion. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 256-257; 101 S.Ct. 1089, 1093, 1095-1096 (1981). Respondent does not carry the burden of persuading the court that it had convincing, objective reasons for the adverse employment action. Id.

Once Respondent has articulated a legitimate nondiscriminatory reason for its adverse employment action, the burden shifts to Complainant to demonstrate that Respondent's proffered motivation was not its true reason but is pretextual and that its actions were actually based upon discriminatory motive. Leveille v. New York Air National Guard, Case Nos. 94-TSC-3 and 94-TSC-4 @ 7-8 (Sec'y Dec. 11, 1995); Carroll v. Bechtel Power Corp., Case No. 91-ERA-46 @ 6 (Sec'y Feb. 15, 1995).

Complainant may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. Zinn v. University of Missouri, Case No. 93-ERA-34 @4 (Sec'y Jan. 18, 1996); Yellow Freight Systems, Inc. v. Reich, 27 F.3d 133, 1139 (6th Cir. 1994). As noted above, Complainant retains the ultimate burden of proving that the adverse action was in retaliation for the protected activity in which he allegedly engaged, and thus was in violation of the STAA.

4. Protected Activity

a. Internal Complaint

Complainant's activity was "internal," i.e., complaints made to Respondent's management, vis-a-vis his letter intended for Mr. Amos but delivered to Mr. Morrison. The letter prompted a follow-up meeting with Respondent's managers and Complainant in which the parties agree Complainant alleged Respondent's trips were illegal.

It is well settled that the Act protects safety-related complaints that are purely internal to the employer. Ake v. Ulrich Chemical Co., Inc., Case No. 93-STA-41 @ 5 (Sec'y March 21, 1994); Clean Harbors Environmental Services, Inc. v Herman, supra at 19. In the Fifth Circuit, within which this matter arises, there is jurisprudence establishing internal complaints may not be protected activity under the provisions of the Energy Reorganization Act (ERA). Brown & Root, Inc. v. Donovan, 747 F.2d 1029 (5th Cir. 1984). However, the holding of Brown & Root, has not been extended to cases arising under the Act. Doyle v. Rich Transport, Inc., Case No. 93-STA-17 (Sec'y Apr. 1, 1994); Stiles v. J.B. Hunt Transp., Inc., Case No. 92-STA-34 (Sec'y Sept. 24, 1993); Davis v. H.R. Hill, Inc., Case No. 86-STA-18 (Sec'y Mar. 19, 1987).

Section 405(a)(1)(A) of the Act is referred to as the "complaint clause," which prohibits, inter alia, the discharge of an employee or discipline or discrimination against an employee

regarding pay, terms, or privileges of employment because the employee has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard or order. Protection under the complaint clause is not dependent on actually proving a violation of a commercial motor vehicle safety regulation; the complaint need only relate to such a violation. Schulman v. Clean Harbors Environmental Services, Inc., Case No. 98-STA-24 @ 6 (ARB Oct. 18, 1999); Barr v. ACW Truck lines, Inc., 91-STA-42 (Sec'y Apr. 22, 1992)(a complaint related to a safety violation is protected under the Act even if the complaint is ultimately determined to be meritless).

Respondent concedes it received a written letter from Complainant on March 13, 2002, expressing a belief its runs were illegal. The parties agree a meeting followed in which Complainant, Mr. Morrison, and Mr. Vincent discussed his complaint that clearly included complaints of illegality as well as demands for a sleeper cab. Accordingly, Complainant engaged in protected activity under the Act by filing an internal complaint.

b. Refusal To Drive

A refusal to drive is protected under two provisions of the Act. The first provision, 49 U.S.C. § 31105(a)(1)(B)(i), requires Complainant to show he refused to operate a vehicle because the operation "violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health." The second refusal to drive provision, 49 U.S.C. § 31105(a)(1)(B)(ii), focuses on "whether a reasonable person in the same situation would conclude that there was a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition." See Yellow Freight Systems, Inc. v. Martin, 983 F.2d 1195, 1199 (2d Cir. 1993); Stauffer v. Wal-Mart Stores, Inc., Case No. 1999-STA-21 @ 4, 6, 10 (ARB July 31, 2001).

In the instant matter, Complainant seeks to avail himself of both provisions of the Act. He contends he was terminated because he refused to operate Respondent's commercial motor vehicle on March 15, 2002: (1) when the operation of his vehicle violated a regulation, and (2) because he had a reasonable apprehension of serious injury to himself or to the public due to his fatigued condition. His arguments under both theories are specious and without merit for the same reasons.

There is no evidence of record indicating Complainant refused any driving assignment in this matter.[27] In December 2001, when he allegedly became frightened, Complainant continued driving for Respondent until his eventual termination on March 18, 2002. On March 15, 2002, Complainant continued driving on-duty after he was out of hours and after he notified Respondent, who directed him to rest at a hotel. Mr. Lane testified Respondent acted correctly, and Complainant admitted Respondent maintained a facility in Waco which could have secured a room and otherwise provided assistance.

Complainant's testimony, which finds no corroborative factual support in the record regarding the events of his round-trip between Dallas and San Antonio on March 14 through 16, 2002, is simply not persuasive in establishing the events of his trip. As noted above, Complainant's unverified driving logs are of no probative value. Likewise, there is no receipt supporting his testimony he stayed at a Waco hotel for eight hours. Accordingly, there is no basis to conclude Complainant ever refused to drive, or if he refused to drive, whether his refusal would be protected under either provision of the Act. Therefore, while Complainant established he engaged in protected activity under the Act by filing an internal complaint, I find he failed to establish he engaged in any other protected activity by refusing to drive under the Act.

5. Respondent's Adverse Action

Adverse action closely following protected activity "is itself evidence of an illicit motive." Donovan v. Stafford Const. Co., 732 F.2d 954, 960 (D.C. Cir. 1984). The timing and abruptness of a discharge are persuasive evidence of an employer's motivation.

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[27] Complainant relies on Turgeon v. Maine Beverage Container Services, Inc., Case No. 93-STA-11 (Sec'y, 30, 1993) to argue he was terminated for his protected refusal to drive while fatigued. The facts of that case are inapposite to the facts at hand. There, the record clearly supported a conclusion the respondent compelled its employees to falsely log driving hours and would even assist the drivers in that task. The complainant in Turgeon, clearly refused an assignment to drive because of fatigue. Case No. 93-STA-11 @ 3-4. Here, the record does not support a conclusion Respondent compelled its employees to falsely log driving hours or even assist the drivers in that task, nor is there evidence Complainant refused to accept a driving assignment or discontinue driving or remaining on duty when he was out of hours or fatigued.

NLRB v. American Geri-Care, Inc., 697 F.2d 56, 60 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983), citing NLRB v. Advanced Business Forms Corp., 474 F.2d 457, 465 (2d Cir. 1973). See NLRB v. RainWare, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984). It is undisputed Complainant was terminated on March 18, 2002, only days after he raised an internal complaint with Respondent. If this matter were timely filed, which is not supported by the record, the pivotal issue would be whether Respondent's decision to terminate was motivated even in part by his protected activity. I find Respondent's action was not so motivated for the reasons below.

6. The Alleged Legitimate, Nondiscriminatory Reason for Termination

The Act does not prohibit an employer from discharging a whistleblower where the discharge is not motivated by retaliatory animus. See, e.g., Newkirk v. Cypress Trucking Lines, Inc., Case No. 88- STA-17 @ 9 (Sec'y, Feb. 13, 1989)(although a complainant engaged in protected activity, he was terminated by the respondent's managers who collectively determined to discharge the complainant for his failure to secure bills of lading); cf. Lockert v. United States Dept. of Labor, 867 F.2d 513, 519 (9th Cir. 1989)(an employee who engages in protected activity may be discharged by an employer if the employer has reasonable grounds to believe the employee engaged in misconduct and the decision was not motivated by protected conduct); Jackson v. Ketchikan Pulp Co., Case No. 93-WPC-7 (Sec'y Mar. 4, 1996) (when a respondent's beliefs that the complainants engaged in sabotage, which was not a protected activity, played a major role in its decision to terminate them, it needed to prove only that the managers who decided to fire the complainants had a reasonable and good faith belief the complainants engaged in the unprotected activity).

To prevail under the Act, the employee must establish that the employer discharged him because of his protected whistleblowing activity. Newkirk, supra @ 8-9. It is Respondent's subjective perception of the circumstances which is the critical focus of the inquiry. Allen v. Revco D.S., Inc., 91-STA-9 @ 5-6 (Sec'y Sept. 24, 1991) (a complaint was dismissed when the respondent presented evidence of a legitimate business reason to discharge complainant -- falsification of logs and records -- and the evidence permitted an inference that the employer believed that the schedule could be run legally and believed that complainant illegally and unnecessarily falsified his logs).

Complainant argues his termination was the result of a "set up." Specifically, he argues Respondent fabricated his delay in

Dallas by compelling him to attend a safety meeting, watch a video, and take a test before departure. Thereafter, he argues he was forced to remain on-duty in San Antonio, which caused him to run out of hours on his return trip. Consequently, he argues Respondent arranged a situation where he could be terminated for violating the FMCSR or for delaying freight.[28] His argument has no factual support and is without merit.

Respondent's managers and Mr. Weigle established no safety meeting, videotape exhibition, or examination occurred on March 14, 2002 before Complainant departed for San Antonio. As noted above, Complainant's testimony is unconvincing in establishing the events of his trip from March 14 through 16, 2002, and his driving logs for that period are of no probative value. There is no corroborating testimony to support Complainant's contention that he was directed to continue driving in excess of FMCSR limits. Meanwhile, Mr. Weigle testified he left after Complainant on the same trip, but arrived on-time, well ahead of Complainant.

I find Respondent's managers who decided to terminate Complainant had a reasonable and good faith belief he engaged in unprotected activity, i.e., that he fabricated driving logs, failed to timely contact Respondent about meeting or exceeding his maximum driving time, failed to submit his driving logs and freight bills upon completion of his trip, failed to reasonably explain to Respondent the circumstances of his 21.5-hour trip from San Antonio to Dallas, and for delaying freight. Disciplinary treatment for such actions is expressly provided for in Respondent's Driver's Handbook for employees whose employment is "at-will."

Complainant admitted falsely logging hours out of habit, and the record supports a conclusion his log regarding his March 14, 2002 departure from Dallas incorrectly reflects time for a meeting which did not occur. Mr. Lane supports Respondent's argument that Complainant should have reasonably appreciated his remaining driving time before departure from San Antonio and could have reasonably notified Respondent of his time constraint before departing for Dallas. The parties agree Complainant was counseled after he became involved in an altercation in which police

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[28] Complainant relies on extra-record excerpts of deposition transcripts of Mr. Vincent and Mr. Morrison which appear to indicate the facts of his discharge, including the confrontation prior to discharge and the litany of reasons Respondent identified in its reasons for discharge, warranted Respondent's decision to terminate Complainant.

intervention was threatened to stop Complainant from taking a sleeper cab. Although he did not sign the Interview Report Form, Complainant agreed with Respondent he would drive within legal limits.

The parties agree Complainant failed to submit his paperwork upon arrival in Dallas on March 16, 2002. The parties agree Complainant failed to contact Respondent to explain his trip or deliver his paperwork after his arrival. The parties agree Complainant knew there was a terminal in Waco which had a designated hotel room for drivers who are out of hours. The record further indicates the Waco terminal could have arranged for the timely arrival of Complainant's cargo had Complainant reasonably traveled to the terminal. Mr. Vincent persuasively testified his recommendation to terminate would remain the same if Complainant never filed an internal complaint.

In light of the foregoing, I find, alternatively, Complainant failed to establish that Respondent discharged him because of filing an internal complaint. I find Respondent's decision to terminate was not motivated by any discriminatory animus. Rather, the evidence indicates Respondent believed that Complainant's schedule could be run legally and that Complainant illegally and unnecessarily falsified his logs, failed to submit required paperwork, failed to reasonably return timely, and otherwise unreasonably delayed freight. In the absence of a showing of discrimination and animus, Respondent is not prohibited from discharging Complainant for his misconduct.

7. Relief

In the present matter, Complainant was unsuccessful and is not entitled to affirmative action under the Act, which provides for action to abate the violation, reinstatement, attorney fees and costs, and compensatory damages. 49 U.S.C. § 31105(b)(3)(A). Consequently, the relief he requests is hereby **DENIED**.

VI. CONCLUSION

I find and conclude Complainant failed to timely file his complaint, which is dismissed. Alternatively, I further find and conclude that, on the facts presented, Complainant failed to establish his complaints of discrimination under the Act have any merit. I find and conclude that, despite the temporal proximity between Complainant's protected activity and his termination, the preponderance of the record evidence establishes Respondent

terminated Complainant for reasons unrelated to any activities protected under the Act.

VII. RECOMMENDED ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Complainant's claim is hereby **DISMISSED**.

ORDERED this 11th day of June, 2003, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge